No. 2831

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United States
Circuit Court of Appeals
For the Ninth Circuit

PETER GEDDES, JOSEPH R. WALKER, JOSEPH S. BAER, HENRY S. EVERETT, MARGARET ANN MEEHAN, EUGENE BLUM, ISAAC BLUM, EDWARD BLUM, ISADOR BAER, ALPHONS DREYFOOS; and ALPHONS DREYFOOS, EUGENE BLUM, DAVID C. GOLDENBERG, and EUGENE BASCHO, Copartners, Doing Business Under the Firm Name and Style of DREYFOOS, BLUM & COMPANY; LEOPOLD FREUND and ALICE FREY,

Appellants,

vs.

ANACONDA COPPER MINING COMPANY, a Corporation, ALICE GOLD AND SILVER MINING COMPANY, a Corporation, and JOHN D. RYAN, J. W. ALLEN, W. D. THORNTON, A. C. CARSON, and E. S. FERRY,

Appellees.

BRIEF OF APPELLEES

L. O. EVANS,
W. B. RODGERS,
D. GAY STIVERS,
Solicitors for Appellees.

MC KEE PTG. CO., BUTTE, MONT.

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I.

STATEMENT OF THE CASE.

In view of the contentions herein to be presented, it is necessary that a statement, additional to that made in the brief of Appellants, should be made, and we shall attempt to make the same as concisely as possible.

CORPORATE PROCEEDINGS OF ALICE COMPANY TOUCHING SALE OF ITS PROPERTIES TO ANACONDA COPPER MINING COMPANY, AND ATTEMPTED DISSOLUTION OF ALICE COMPANY.

That prior to the meeting of stockholders herein mentioned, the proper officers of the Anaconda Copper Mining Company and the Alice Gold and Silver Mining Company, pursuant to authority vested in them by the respective Boards of Directors of said Companies, entered into a contract and agreement whereby, subject to the approval of the stockholders of the Alice Company, said Alice Company was to convey to the Anaconda Company, for a consideration of thirty thousand shares of the capital stock of said Anaconda Company and other incidental considerations, all the property of said Alice Company.

Thereupon, by order of the Board of Directors of the Alice Company, a stockholders' meeting of said Company was duly and regularly called and noticed, to be held at the principal office of the Company, in Salt Lake City, Utah, on the 27th day of May, 1910, for the purpose of considering the proposition of confirming and ratifying said contract of sale. This meeting was in all respects regular, and all of the stockholders of the Company had due notice thereof. Stock of the Company aggregating 295,100 shares, out of a total outstanding issued stock of 400,000 shares, was represented

at said meeting, either in person or by proxy. Thereupon, the contract heretofore referred to was submitted to said meeting of stockholders, and was duly ratified and confirmed by a vote of 289,500 shares for, and a vote of 5,510 shares against, said dissenting stockholders being among those represented as Appellants in this case. (See Tp., Vol. I, pages 317-347.)

In pursuance to express authorization by the Board of Directors of the Alice Company, so ratified and confirmed by more than two-thirds of the outstanding capital stock of the Alice Company, on the first day of June following, the Alice Company, by John D. Ryan, its President, duly executed a deed of conveyance, conveying all of the Alice Company's property to the Anaconda Company.

At the time of these transactions, it was the intention of the Board of Directors of the Alice Company to dissolve said Company and distribute its assets to the stockholders. Upon this point Mr. C. F. Kelley testified as follows:

> "The plan from the inception of the general idea of consolidation was to sell the properties of the Alice Company to the Anaconda Company and at or prior to this meeting a meeting of the stockholders of the Alice Company was called, in the event that the stockholders should ratify the sale by the directors and the properties be conveyed, that there should be a dissolution of the Alice Gold and Silver Mining Company,—as a matter of fact, I think that prior to that time, the time of the Alice directorate meeting, we had represented to the

> New York Stock Exchange as a condition to the listing of the stock, that these subsidiary companies, whose holdings would consist of nothing but Anaconda stock, would be dissolved in order to eliminate any objection that the Stock Exchange might have to double subsidiary companies, or holding companies within holding companies. *I know that was the purpose of the officers and directors of the Alice Company at and prior to the meeting calling this stockholders' meeting."* (Tr., Vol. II, pages 853-854).

Pursuant to this general plan, the Board of Directors of the Alice Company, by resolution, called a meeting of the stockholders of said Company, to meet on the 8th day of May, 1911, for the purpose of considering a proposition to dissolve said corporation and to wind up and terminate its existence. This meeting was duly noticed and was in all respects regular. 310,963 shares of the Alice Company were represented thereat. By a vote of 297,088 shares to 13,385 shares, it was resolved that the Alice Gold and Silver Mining Company should take all necessary steps and do all things necessary and proper under the laws of the State of Utah to secure the dissolution of this corporation and to cause a proper distribution to be made to the stockholders entitled of all of the assets and property of said corporation. (Tr. Vol. I, pages 347-365).

Those who dissented are the Appellants in this suit.

The bill of complaint herein was filed on the 6th day of November, 1911, almost eighteen months after the stockholders had approved and ratified the transaction.

II.

RELATIONS EXISTING BETWEEN THE ALICE COMPANY AND ANACONDA COMPANY AT TIME OF THE TRANSFER.

At the time of the transaction complained of, the Anaconda Company exercised no controlling influence over the affairs of the Alice Company, further than the fact that John D. Ryan was a director of the Alice Company and its President, and also a director of the Anaconda Company.

The Board of Directors of the Alice Company consisted of five members, none of whom, save Ryan, had any voice in the affairs of the Anaconda Company.

It is true that the Butte Coalition Company, a holding company organized for the purpose of holding the stock of the Red Metals Mining Company and such other stocks of mining companies as it might purchase, was the owner of a majority of the stock of the Alice Company. Said Butte Coalition Company had a capitalization of One Million shares of the par value of Fifteen Dollars per share. Neither the Anaconda nor Amalgamated Company exercised any right of control over either the Red Metals Mining Company or the Butte Coalition Company. These companies were entirely separate, independent and distinct from either Anaconda or Amalgamated. They were neither organized nor controlled, through directorates or stock ownership, by either of said Companies.

These properties were known as the Cole-Ryan Companies, the controlling spirit in which was one Thomas F. Cole and his associates; and neither the said Cole nor his associates have ever had any voice in the management of either Anaconda or Amalgamated.

Out of the One Million shares of Butte Coalition, Anaconda owned none and Amalgamated only Fifty Thousand.

Mr. John G. Morony says:

> "The organization of the Butte Coalition Company was absolutely separate and distinct from the Amalgamated Copper Company, and as a matter of fact, the Amalgamated Company had absolutely nothing to do with the Butte Coalition Company at the time of its organization, and as far as I know the Amalgamated Copper Company has had absolutely nothing to do with the Butte Coalition Company since its organization." (See Transcript, Vol. I, page 280).

Mr. John D. Ryan says:

> "There was no one directly associated in the negotiations with Heinze who had any connection with the Amalgamated Copper Company but myself and attorneys who were acting for me. These negotiations were all with Mr. F. Augustus Heinze. I did not feel that I was representing the Amalgamated Copper Company in these negotiations. I had no authority from the Amalgamated Copper Company to proceed with the negotiations, and as a matter of fact was never acting for the Amalgamated or its interests except insofar as the dismissal of the litigation would prove to be to its interests, and I was trying to bring that about as a part of the trade." (See Tp., Vol. I, pages 382-383).

The titles to the Heinze properties passed to Thomas F. Cole, and from Thomas F. Cole were transferred to the Red Metals Company. Ten and one-half million dollars was paid in cash for the Heinze properties. There was not any difficulty in raising the money. The stock was largely over-subscribed. The transfer was made to Cole and from Cole to the Red Metals Mining Company, and then the Butte Coalition Company was organized and it became the holder of the stock of the Red Metals Mining Company. (See Tp., Vol. I, pp. 382-384).

In 1905 Mr. Ryan obtained an option on a majority of the stock of the Alice Company, as a personal transaction of his own, and later, upon the organization of the Butte Coalition Company, this option was transferred to it and the stock acquired.

All other matters, save the fact that Mr. Ryan was a common director of the two Companies, are wholly unimportant as tending to show control of the Alice Company by either Anaconda or Amalgamated.

It is immaterial through what channel those who held the proxies to vote Alice stock at meeting of the Alice Company received instructions as to how to vote upon the question of sale of Alice properties. The proxies were sent out by the Secretary of the Alice Company. They were accompanied by a circular from the management advising each stockholder that in the opinion of the management the agreement of the Com-

pany, entered into by authority of its Board of Directors with the Anaconda Company, ought to be ratified and was advantageous to Alice stockholders. In response to this circular letter, the stockholders voting for the confirmation of the trade signed the proxies authorizing the persons named to vote their stock at this meeting and returned them either directly to these persons or to the Secretary of the Company who had transmitted the blank proxies and the circular letter. Under these circumstances this constituted a direction of the principals to their agents to vote the stock in favor of the proposition equally as much as though each stockholder had given a special direction to vote the stock in this manner. The result was that the persons named in the proxies, or their substitutes, voted this stock directly in accordance with the wishes of the stockholders, and no stockholder has ever disaffirmed the conduct of those who acted for him. In other words, the authority to vote the stock in favor of ratifying the sale of Alice properties to the Anaconda Company came directly from the stockholders themselves, and the particular channel through which this information was conveyed to those whose duty it became to vote the stock is entirely immaterial. It is also immaterial that Mr. Kelley, Chief Counsel for the Anaconda Company, was one of the proxy holders, or that Mr. D. Gay Stivers, another one of the counsel, actually attended the meeting, for the reason that it does not appear in any way that either Mr. Kelley or Mr. Stivers gave any advice

to the stockholders of the Company as to whether the sale should be either ratified or rejected.

Of equally small consequence is it that Butte Coalition, in which neither Amalgamated nor Anaconda had a controlling voice, had an office in the same building with the Alice Company, in the City of New York, or that Ryan and Cole were friends, or that matters in controversy were settled amicably between the Red Metals Company and the Anaconda Company, or that the attorneys for the Anaconda Company became the attorneys for the Red Metals Company, or that Mr. Gillie, General Superintendent of Anaconda mines, became the custodian of the Alice, or that Mr. Alley sometimes signed the checks of the Alice and had an office in the same building with Counsel for the Anaconda Copper Mining Company.

None of these things had an influence, so far as the testimony discloses, or any effect whatever, upon the final action of the stockholders of the Alice Company in ratifying the sale of the Alice properties to the Anaconda Company, and none of these persons gave any advice whatever to any stockholder of the Alice Company as to the propriety or advisability of the sale of Alice properties to the Anaconda Company from a business standpoint.

The fact that Mr. Ryan being a director of the Alice Company, was also its President, is of no concern. It does not appear that as President Mr. Ryan had, either

under the by-laws of the Alice Company or the laws of the State of Utah, any extraordinary powers. As President, he was undoubtedly only an executive officer. It was his duty only to execute the will of the Board of Directors as expressed in corporate action, such Board of Directors being the governing body of the corporation. Therefore, the question of unity of control or influence of the Anaconda Company over the conduct of the Alice Company resolves itself into the sole question, insofar as it affects this sale, of there being one common director of Anaconda and Alice.

III.

VALUE OF ALICE PROPERTY IN THE YEAR OF 1910.

That the market value of the Alice property in the year 1910, if indeed it had any market value whatever, was far below what was paid for it by the Anaconda Company, and far below what any one, save the Anaconda Company, with its facilities for cheap development of the property, could or would have paid, is indisputable; and that the price paid by the Anaconda Company was fair, full and adequate, is apparent from a moment's attention to the history of the Alice, the condition of the Alice Company and the metallurgical possibilities of the property. This property appears to have been acquired about the year 1876, and the Company was incorporated in the year 1880. It contained silver ores, much of which carried large quanti-

ties of zinc. For some years it was operated profitably, yielding altogether dividends to its stockholders in the amount of $1,075,000. As its development progressed the ores became much leaner in metal contents, and also much more difficult to treat, on account of the presence of refractory elements, increasing the cost of reducing and treating the same. Increased depths added to the cost of mining and handling, and coincident to the increase of the mining and reduction costs, and lessening of value, the price of silver, the one valuable constituent of the ore, decreased very rapidly, so that about the year 1893 profitable mining operations upon the property ceased, and the property which had been developed to a depth of fifteen hundred feet, and which contained over ten miles of underground workings (Tr., Vol. II, page 935), was allowed to fill with water up to the seven or eight hundred foot level. Thereafter, a system of leasing was carried on at the property, resulting, after the year 1898, in a constant loss, from over $20,-320.80, the greatest, in the year 1902, to $1156.00 in the year 1911. During the same time the market value of its stock declined from approximately Three Dollars a share during the early periods of its operation, to a merely nominal sum, and for a period of ten years preceding the acquisition of a majority of the capital stock by the Butte Coalition Company in 1906, the only recorded sale during that time was at the price of twelve and one-half cents per share.

In addition to showing a yearly loss, at the time of

the sale to the Anaconda Company in 1910 the Company had an outstanding indebtedness of about Thirty-four Thousand Dollars, and had no funds whatever with which to meet the same. There were no ores in the mine of known value; although developed to a depth of fifteen hundred feet, and with ten miles of underground workings, these workings were caved and dilapidated; mill and hoist had burned; and except for bodies of zinc-bearing refractory ores of no known value, the entire asset of the Company was represented by this worked-out and dilapidated mining property.

No process was then or is now known by which the zinc ores, or any other ores, known to exist in the mine could be profitably mined and treated. Whether such a process would ever be found was and still is wholly problematical, for notwithstanding great progress in the treatment of zinc ores in the Butte Camp has been made in recent years, the Alice ores, being entirely different and quite more refractory than other zinc ores in the Butte Camp, have not yet been successfully subjected to treatment. To develop such a process, if indeed the same could be developed at all, would require enormous sums of money, such expenditures to be made subject to ultimate failure.

To open up the mine and equip it for prospecting and development work would have required an expenditure in excess of Two Hundred Thousand Dollars; to work the mine and treat the ores would have required a much

larger expenditure, the testimony showing that to build a mill of only five hundred tons capacity would cost approximately Five Hundred Thousand Dollars (See Tr., Vol. II, pages 938-939).

There was no feasible method by which funds could be raised to further exploit and develop the property or discharge its indebtedness. The Company had nothing to offer upon which any reasonably prudent individual would have advanced these sums of money. (See Tr., Vol. I, pages 397-400).

The property had been thoroughly examined by skilled representatives of two of the largest zinc companies in the United States, the Empire Zinc Company and Beer-Sondheimer & Company, and after such examination the properties were offered to such companies on lease, but the zinc operators declined to have anything to do with them.

Judging from Appellants' statement of facts, touching value of Alice property, beginning on page 17 of their brief, it would appear that the sole reliance of Appellants to sustain the conclusion of the Court, that the price paid for Alice of $1,500,000 and assumption of Alice's debts, was inadequate, is that Alice ground contains copper of commercial value, and in an amount and so readily accessible that from its proceeds a purchaser could recoup a purchase price in excess of that amount and all expenditures for the recovery of the same.

The record discloses that such a contingency is, if anything, no more than a bare possibility, and wholly insufficient as a basis for an estimate of greater value of the property.

Alice is located in the silver zone of the Butte District. Notwithstanding ten miles of underground workings, no commercial copper has ever been found therein, neither has any ever been found in reasonable proximity to this ground. If any copper is to be found therein it must be in certain veins, some of which tend towards the Alice ground, which, so far as explored outside of the limits of the same, bear copper ores only in pockets, and in their progress towards the Alice ground become either barren or change the character of the mineral contents from copper to silver or zinc.

The record is so barren of any evidence which would lead a reasonably prudent mining investor to entertain a well-founded hope that commercial copper exists in Alice ground that counsel are, and the Court must be, surprised at the contention of Appellants.

Mr. Goodale, a metallurgist of repute, connected with the Anaconda Copper Mining Company or some of its subsidiaries since 1898, both in its smelting department and as Assistant Manager of the Company, and entirely familiar with the entire mining district of Butte, testified as follows:

> "To my knowledge there has never been discovered a vein of copper of any kind or character in any of the Alice properties. I will say in that

connection, that I looked at the report of Professor Blake to see if he mentioned occurrences of copper there in 1898, and he did not." (See Tr., Vol. I, page 299).

Again:

"I spoke about Professor Blake's report on the copper district of Butte. He examined the Alice mine somewhere about 1885 and there is a paper he published on the silver mining in Butte. That, I think, was in 1887. Silver was the chief product of the Butte camp in 1885. I am inclined to think that by that time copper was over-balancing the silver in value of product." (See Tp., Vol. I, page 305).

Mr. Buzzo, Acting Superintendent of the Alice property from November, 1906, speaks of the Alice as containing a large body of lead and zinc ores. (See Tp., Vol. I, page 375). And in reply to a question as to copper in the vicinity of the Alice said:

"No, there is no ground near there that is worked for copper that I know of." (See Tr., Vol. I, page 378).

Mr. Ryan said:

"The Alice properties are far to the northwest and outside of any territory that has ever produced copper in paying quantities." (See Tr., Vol. I, page 392).

Again:

"The mine has been worked to a depth of about fifteen hundred feet, and even with silver above a dollar an ounce, had closed down. No one had ever been able to find a process that would make the zinc ore in the mine commercial, *and there has*

never been known to be any copper in the mine, so we did not see what representations we could make to the shareholders to induce them to put up money to carry on operations." (See Tp., Vol. I, page 398).

Mr. Corry, mining expert on behalf of Appellants, to prove inadequacy of consideration for Alice properties, in speaking of these properties, said:

> "Speaking from my own knowledge that is available to everybody these old claims were worked for their silver contents by the former operators, the Alice Company, and by lessees subsequent to that time. In other words, the activity upon the Alice lode has been wholly confined to the mining of silver ores. They may carry a greater or less extent of gold—primarily for the silver contents." (See Tp., Vol. II, pages 726, 727).

Again:

> "As to how extensively the Butte camp was prospected and worked for silver,—it was prospected over a greater portion of the entire district, and for several miles around, for silver, but the actual silver production,—producing properties, were confined more to this northern portion of the camp, and especially to the Alice on the Rainbow ledge, and in that vicinity and to the westerly of the ground shown upon this exhibit,—plaintiffs' exhibit 1, Corry." (See Tp., Vol. II, pages 731-732).

Again:

> "I do not know of any place in the Rainbow ledge or lode, outside of in the Elm Orlu, where copper ores of a commercial character have been found. What copper they found in the Elm Orlu was in the cross vein, a southeasterly and northwesterly vein; a vein entirely independent and of

> a different age and system than the Rainbow system of leads, but in close proximity to the Rainbow lode, as I stated. * * * I do not know distinctly of any east and west vein in this vicinity carrying copper minerals, except that it would be accidental; I cannot conceive of how such a thing could happen." (See Tp., Vol. II, pages 748-749).

Mr. Weed, an expert upon whom Appellants apparently place great reliance, in describing the Alice mine, said:

> "I have known the Alice mine and the surrounding property since 1896. I should say, as to just what particular prominence the Alice property has in the general geology of Butte,—it has the largest and best developed silver ledge or lode of any known in this district, and one of the largest probably in the Unietd States; it is a lode that can be traced for a long distance,—I should say, roughly speaking, a mile, and the heart of the mineralization of that lode appears to be in the center of the Alice group; it is a very great lode, which has produced, as we all know, large sums of money in silver, and a lode which, at the time I visited it, was considered to be a probable source of zinc." (See Tp., Vol. II, page 779).

Again, he said:

> "I haven't any information that there are any profitable copper ore bodies in the Alice at present, —not any more than the zinc." (See Tp., Vol. II, page 811).

The only competent evidence contained in the record tending to show any copper in the Alice ores is the testimony of Buzzo, in which he said:

> "There never were any ores left there simply because they contained copper that I know of. All

> the ore in the Alice contained a very small percentage of copper; about one-tenth to perhaps four-tenths of one per cent." (See Tp., Vol. II, page 895).

Mr. Sales, Chief Geologist for the Anaconda Copper Mining Company, and more familiar with the entire Butte district than any other witness called to testify, touching this point said:

> "Taking the Rainbow lode, from the presence of copper in that vein such as shown and the general geological characteristics of the lode or veins, *I should consider it* a possibility but a very remote probability of there being commercial copper ore in the Rainbow Lode. I do not know of anything geological, or anything any other way that would indicate the probability of its containing copper at depth. I think the general tendency of the developments in that section up there is rather towards the opposite. I should be surprised to have commercial copper developed in any quantity." (See Tp., Vol. II, pages 910-911).

Appellants seem to rely, as an element of great value, upon the possibility of certain northwest and southeast veins, known in the Butte District as the Blue Vein series, passing northerly and westerly into the Alice ground, and after passing within the surface boundaries of the same, bearing copper ores. It is practically conceded throughout the record by all the witnesses that, so far as known, the Rainbow Lode bears no copper ores. The contention of appellants that the Alice properties have a potential value on account of copper ores contained therein, was, however, practically dis-

allowed by the Court, the Court stating in its opinion that such contention was of little consequence.

Chief among the veins mentioned by Appellants' witnesses, belonging to the Blue Vein series, are the Jessie and Edith May. No witness ventures the assertion that either of these veins passes through or into the Alice ground. All witnesses admit that these veins are pockety, and throughout long distances barren of mineral value. No witness ventures the assertion that even if passing through Alice ground there are any indications that any of such pockets of valuable copper ore would be found therein. It is uncontradicted that as any of these northwest and southeast veins pass northerly and westerly they become leaner in ore values, and instead of continuing to bear copper ores, such ores as are found are of the silver and zinc variety.

All the knowledge now available in reference to these veins was available to the complainants in this cause when, in 1906, they optioned to John D. Ryan, a majority of the stock of the Alice Company on a basis of Six Hundred Thousand Dollars, or thereabouts, for the entire Alice property, with the sole exception that in the Badger State claim the Edith May vein has, within recent years, upon vigorous development, produced more copper ores than it did theretofore.

Any development of copper ores in either of these veins can hardly be said, under the evidence, to be in close proximity to the Alice property, and even if this

were true, in the absence of any substantial proof that said veins continue ore-bearing into the Alice ground, it would be of no consequence. Alice lies within the silver district. The copper district of Butte is also well-defined. Every ore-bearing zone has its limitations. If close proximity were, after forty years of vigorous development in a mining camp, any substantial evidence of contiguous values, then the history of mining ventures should be rewritten.

Mr. Corry, expert on values for Appellants, did not think sufficiently of the possibility of any of the Blue Vein series extending into the Alice property, and bearing therein commercial copper ores, to consider such possibility as a basis for his arbitrary estimate of the value of the Alice property at Three Million Dollars.

Mr. Goodale says:

> "I do not know of any extension northerly in the Jessie vein and in the Badger State. * * * The Alice properties lie northerly and northwest-westerly of the Badger State." (See Tp., Vol. I, page 299).

Again, he says:

> "I do not know of any copper ore in the Badger State in any vein which in my opinion extends into the Alice Ground.'" (See Tp., Vol. I, page 300).

Mr. Ryan says:

> "The Badger State claim I should say would be about one thousand feet from the Alice properties, but the Badger State workings more than that, probably two thousand feet from the Alice properties. There was an entirely different character

> of ore there. The ores opened in the Badger State are not zinc ores; they are copper ores with some little zinc, but copper ores running high in silver. The Lexington properties adjoining the Alice properties on the south have been worked extensively by the La France Company or one of Heinze's companies within the last four or five years. That lies between the Alice properties, and the copper-producing properties on the western end of the Camp." (See Tp., Vol. I, page 421).

Mr. Ryan then describes the history of the Lexington properties, the attempt of Heinze and his companies to operate the same and expenditure of money thereon, and the utter failure of the Lexington to pay a profit to its operators, and the purchase of the same for the sum of Two Hundred and Fifty Thousand Dollars. (See Tp., Vol. I, pages 421-422).

The Poser mine and the Pilot Butte, mentioned in the testimony, had not made any developments that would give the Alice property any value up to the time that the Alice property was sold to the Anaconda Company. (Ryan—Tp., Vol. I, page 399).

In speaking of the Edith May and Jessie Veins, Mr. Corry, expert mining engineer on behalf of Appellants, also said:

> "As a mining engineer, I would say as to these veins continuing until the encountering of the Rainbow lode itself, that between this point last referred to and the southern limits of the Alice property, there are a series of holes which bring this line of outcrop to within possibly 100 feet of the southern boundaries of the Alice group, and I

would say that they would at least continue to the intersection with the Alice lode, and if possible would continue a distance into the Rainbow lode." (See Tp., Vol. II, page 730).

After having given an estimate of the market value of the Alice property at the sum of Three Million Dollars, the witness said:

"All that I know about the Alice is what I got from the surface examination and surface study. I have not been underground in the Alice to any depth; I have been down 30 or 40 feet." (See Tp., Vol. II, pages 736-737).

Again:

"The entire surface has been gone over, back and forth, and has been quite thoroughly prospected. In placing my value on the property, I did not consider whether or not there still was great deposit of a silicious silver ore, a low grade which was too low grade at that time, but which could very likely be treated by a percolating or cyaniding process. I did not consider that that was a feature of it, although of course, it occurs to me, but *I base my valuation of that property as it appealed to me upon its location,*—I considered that the Alice was not thoroughly depleted to the 1500 foot level on the veins there. I considered that the fact of obtaining anything above the 1500 foot level from which I believe there exists some possibilities, would simply add to its worth. *I did not give any value at all to ore bodies that are known above the* 1500 *foot level.*" (See Tp., Vol. II, page 740).

Again:

"It is my belief that there are great possibilities as to the treatment of what may have been too low

grade silver ores for them to treat at that time. I do not know today of any ores above the 1500 foot level in the Alice properties that I could say I could treat profiitably at this time by any process." (See Tp., Vol. II, page 741).

Again:

"I do not know of any place in the Rainbow ledge or lode, outside of in the Elm Orlu where copper ores of a commercial character have been found. What copper they found in the Elm Orlu was in the cross vein, a southeasterly and northwesterly vein; a vein entirely independent and of a different age and system than the Rainbow system of leads, but in close proximity to the Rainbow lode, as I stated." (See Tp., Vol. II, page 748).

Again:

"I do not despair of finding copper ore in the Rainbow lode itself. The Rainbow lode has been develped from the Rising Star on the west on through the Alice ground to the Elm Orlu, and I carry it to the Black Rock, and the Alice is 1500 feet and the Moulten 1500, and I know of no place where copper ore has been found in the vein itself. *Somebody has to finally find something in that vein, and I do not consider that sufficiently deep development has been done in that vicinity to tell the last story.* This then is classed not as copper bearing but as a silver vein. It has a different geological formation than the copper veins of Butte." (See Tp., Vol. II, page 750).

The witness then states that the country adjacent to the Alice has been pretty well developed underground, and describes the work on the Pilot, the Currie and the Blue Wing, and declares that he does not know of any

place, either in the Alice ground or outside of it, that copper ore has been found in any of the veins referred to therein; neither in the Currie nor the Blue Wing nor the Chief Joseph nor the Lexington. The location of these different properties will be understood by reference to the maps introduced in this cause. (See Tp., Vol. II, page 750).

Speaking of the northwest and southeast veins collectively, including the Edith May and Jessie veins, the witness said:

> "The fact as to whether or not some other vein is pointing towards the Alice ground, and is an ore producing vein or a parellel vein, or a spur that never produced, would certainly be a factor in determining its value, *but my approximation was placed only incidentally upon the possibility of these northwest veins going up.* On my exhibit 2 Corry, I carried that Jessie vein right on through the Rainbow series, and show it a considerable distance to the north, the scale of that map being approximately 400 feet to the inch; and carry it about 1250 feet northerly of the Rainbow lode series. I believe that these northwest veins do, or *will be found,* to go through the Rainbow ledge, with an individuality beyond. *I have never seen this vein doing that.* I cannot say where there are any workings north that would justify the 1500 foot projection north of the Rainbow lode series. (See Tr., Vol. II, pages 753-754).

Again:

> "All these northwest-southeast veins carry their ore in shoots,—are pocketed, as the miners call it. They do not have the regular ore bodies that the old east and west, the Anaconda system, has. The

mineralization is more concentrated; *and you find these barren places in the veins for long distances both on the dip and strike generally.* When you get away from where you find your shoot, it is simply a question of possibility of finding another: there being nothing there to indicate whether the shoot is there or not. * * * I do not know of any copper ore of my own knowledge that has been mined from the Jesse vein." (See Tp., Vol. II, pages 753-754).

Again:

"I sketched a projection of the Edith May north to show the turn there of both the Jesse and Edith May, *and as to whether or not the veins that I do pick up in close proximity to the Alice are absolutely those, as stated, or not, I could not say,* but the mere fact exists that at those points are veins having their general strike and of considerable prominence." (See Tp., Vol. II, page 756).

Again:

"I have heard it uncontradictedly stated that the Badger State gets its ore from an old east and west vein called the Badger State vein. Directly speaking it is not an east and west vein, it is north 76 west, passing through the Badger discovery. *I do not know its course as to whether it would go through the Alice ground at all. I have never studied that out on the surface.* (See Tr., Vol. II, page 756).

In reference to the history of the Butte Camp, as to copper being obtained at depth, the witness said:

"Generally speaking the history of the Butte veins is that they carry silver on the surface, and you got copper at depth,—I mean the copper veins. I do not mean the Rainbow lode, the Black Chief lode, or the Nettie, or the Emma. I do not mean

> the true silver veins, they carry silver from the surface, and do not carry copper so far as they have been developed." (See Tp., Vol. II, page 757).

According to this witness, the nearest ore-bearing copper in commercial quantities is 3200 feet from the Alice ground. On page 769 of Vol. II of the Transcript he says:

> "I should say it is about 1800 feet from the Badger State shaft to the point nearest eastward that I know is profitably worked. It is about 1200 or 1400 feet westward from the Badger State shaft to the Alice ground."

The story of the witness, beginning on page 757 of Vol. II of the Transcript, as to how he arrives at his estimate of the value of the Alice property, and flippantly describing as to how he would advise clients to invest as much as Five Million Dollars in a mining venture of this character, with no knowledge of underground workings in the property, 10 miles in extent, with no knowledge of the character of the ore disclosed in these workings, with absolute knowledge that no known process had been discovered for treating these ores, with no knowledge that any copper-bearing veins pass through the property, with no knowledge of the property whatever except a surface examination, makes most interesting and entertaining reading, but leads the mind irresistibly to the conclusion that the value placed upon the property of Three Million Dollars by the witness is altogether speculative; that it is based

upon nothing worthy of consideration by the court; that it is a simple fancy of an idle dreamer, justified only by a fevered imagination or an elastic conscience; and that the estimate of any other amount, however large and fanciful, would have been of equal weight, and that in short the arbitrary estimate given by the witness is worthy of no consideration whatever in view of the premises adopted by the witness in arriving at his conclusions.

Witness Weed, a mining engineer greatly relied upon by the Appellants, also gave an estimate of the Alice ground as being of the reasonable market value of Three Million Dollars. This estimate of the witness is admitted by him to be purely arbitrary. Indeed, he asserts that under the conditions existing in the Alice property every estimated value must be arbitrary. Therein he disagrees with the learned Judge, who, in his opinion, held that an arbitrary price is prima facie inadequate.

The estimate of this witness must be absolutely discarded by the Court, for the reason that the basis of the same was largely matters of which the witness had no personal knowledge, purely hearsay and incompetent, all of which was duly objected to in the court below, the objections thereto being overruled.

This fact vitiates and renders wholly incompetent the estimates of value which seemed to be so persuasive with the District Court, and requires this Court to disregard the same.

The witness was allowed to testify, against objection, as to general information which he had obtained and statements which are contained in the reports of the North Butte Mining Company, in relation to the large production of copper from the Edith May and Jesse veins. (See Tp., Vol. II, page 782). And also in regard to the position of the Edith May vein on the surface. (See Tp., Vol. II, pages 782-783).

In reference to the underground workings of the Alice and Moulten properties, the witness was allowed to, and did, rely, against the objection of the defendants, upon certain maps which he extracted from the official report of the Alice Company for the year 1884, and also on reports given by the different superintendents to the presidents, and reports issued by the presidents, and based his judgment upon this, and he says that he based his judgment as to the value of the property, so far as that factor went, upon this evidence. (See Tp., Vol. II, pages 784-785).

It needs no argument to convince the court that maps made in the year 1884 for the use of the Alice Company, extracted by this witness from the files of the Company, and reports of its superintendents made to the presidents of the company, are hearsay, self-serving declarations and wholly incompetent as against the Anaconda Copper Mining Company in this suit, and wholly incompetent as a basis for the judgment of this witness in reference to the value of this property.

The witness, against the objection of the Appellees,

was also allowed to testify as to certain conversations which he had with a man by the name of Sherwood, touching the success which the said Sherwood had had in connection with the treatment of the zinc ores belonging to the Butte & Superior Copper Company. (These ores are shown by all of the testimony to be of a different character altogether from the zinc ores of the Alice). (Tr.. Vol. II, pages 788-789).

The witness, conceding that he was not a metallurgist, but only a mining engineer, that he could not speak as an expert in metallurgy, was allowed to give his opinion that the zinc ores of the Alice property could be successfully worked by existing processes. In determining whether or not this could be done, the witness was allowed to use information which he said he obtained from one Walker, as to the results of certain tests on a shipment of ore which Walker declared he had caused Buzzo to ship to Salt Lake City in the year 1902, which the witness stated he verified as far as possible by the shipping returns and the assay receipt, that is, checking each step in the process by the papers submitted. All this against the objection of the Appellees that the same was hearsay and altogether incompetent. (Tp., Vol. II, pages 789-790).

The witness was also allowed to state from these unidentified papers or contents of the same, insofar as it related to the copper contents in the ores in the Alice mine, namely, that the sample about which witness was testifying, and about which he had no personal knowl-

edge, had 1.4 per cent of copper, and that the old records showed an average of better than 1.1 per cent copper; and having so stated the witness used this as a basis for the conclusion that copper ore might be found in the Rainbow Lode, but the witness did not state that there was any probability of copper ore being found in that part of the Rainbow lode included within the Alice group. (See Tp., Vol. II, pages 790-791).

The witness, in connection with his conclusions of value of the Alice property, was allowed to base such estimate upon hearsay and incompetent evidence of the presence and value of zinc-silver ores, although personally he had no knowledge of the existence or value of such ores.

Both this witness, and also Corry, were allowed to use Exhibits V, W, X, Y and Z, pages 450-459, Buzzo's letters to Walker, as a basis for these estimates. These letters were clearly hearsay, selfserving and incompetent as against the defendants, and were duly objected to.

Having thus fortified himself by these hearsay statements, and treating the same as evidence in the cause, and as a basis for his estimate of the value of this ground, and having added thereto another hearsay element, namely, the values placed on adjoining and less desirable claims, of which there was no testimony then or thereafter produced in the case, the witness stated specifically that the value of this porperty was three

million dollars. On page 791, Vol. II of the Transcript, he said:

> "From my study of the ground, I would say that the value of that property in the early part of May, 1910, *giving consideration to the values placed on the adjoining and less desirable claims, and to the other factors, which I have mentioned, I would state specifically, three million dollars.*"

This estimate, for the reasons hereinbefore given, becomes utterly incompetent, is wholly valueless to the Court, and should be discarded.

A further inspection of the testimony of Weed, commencing with page 801, Vol. II. of the Transcript, shows further references to the hearsay and incompetent testimony touching the shipment of ores from the Alice mines heretofore referred to. Among other things, after giving the pretended metal contents of such ores, he says:

> "I have been going on the assumption that the zinc ores would carry 1.1. say, per cent of copper, which would be over twenty pounds to the ton. That would be an important factor in my conclusion as to the value of the ores in the Alice mine."

Let it be noted here that no competent proof was ever introduced which would authorize Mr. Weed to use the results of that shipment as a basis for an estimate of value, or authorize the court in calling the same to its assistance in arriving at a conclusion upon this important point.

The papers purporting to show returns of metal values in this shipment of ore were, against the objection of the Appellees that the same were wholly hearsay and incompetent, introduced in evidence. See testimony of Walker, pages 835-844, Vol. II of Transcript. This evidence was entirely secondary; they were returns that smelting and sampling works had made to Walker. No effort was made to introduce any proof touching the correctness of these returns, or whether they truly represented the value of these ores. Moreover, had such proof been introduced, the evidence was clearly incompetent and of no probative force, for the reason that there was not a particle of evidence that this lot of ore represented the average of the ores disclosed in the Alice workings or a correct or true sample thereof, and from aught that appears in the record, this may have been a picked shipment, taken from a particular place in these workings, and may have been all of this character of ore to be found there. Indeed, it does not even appear by any competent proof, of any nature whatsoever, that this shipment of ore came from the Alice properties.

Upon this incompetent evidence, coupled with Mr. Weed's conclusion (also wholly incompetent because he denied, Tp., Vol. II, page 803, that he was a metallurgist or permitted himself to be so considered) that such ores could be under known methods treated successfully, Mr. Weed, when pressed for the elements of value aggregating Three Million Dollars, said that he con-

sidered the ores disclosed in the Alice workings to be of the value of One Million Dollars, and this was the only specific element of value which he would estimate in dollars and cents. As Corry, so Weed. His reasons for arriving at a Three Million Dollar valuation are so fanciful, contradictory and equivocal, that it is inconceivable that the court should allow such estimate, a predominating influence touching a finding upon this point.

When brought to bay, the witness said:

> "As to the speculative nature of my elements of value, when it comes to pinning them down to actual dollars and cents, I cannot say that this element has so much, and that element so much; if I would fix the whole at so much, upon anything definite in dollars and cents,—it affects the values of the claims basing it roughly at say one hundred or two hundred thousand dollars a claim, that would give me a rough estimate; adding the value of the shaft if it were in good condition would be another element, and the large bodies of zinc ores another; so we have the various elements without placing any specific value on any one. As I recall it, the Alice has about twenty-two claims, and some of those fractions have a strategic value which gives them value far in excess of the mere acreage. You have less than three full claims on the Rainbow Lode, and the others are of less importance; for instance, I understand the Little Maggie which was a good vein and profitable to the 700, *but any valuation is always arbitrary.*" (See Tp., Vol. II, page 821.)

In this connection, and as apropos to any probable value which the Blue Vein Series, known to be copper-bear-

ing, would give to the Alice property, even though it had been established that any of them known to bear copper values passed into the Alice ground, the following statement of Witness Weed is significant:

> "It is true that the Jesse vein and the Edith May vein, as they go to the northwest there, their mineralization is changing and becoming more like the silver mineralization,—the contents." (See Tp., Vol. II, page 814.)

Mr. Kelley testified:

> "On the other hand, the properties of the Alice Company were rather remotely situated, northwesterly from the copper district, or outside of what was known at that time, or in fact still is known, as the boundaries of the copper district." (See Tp., Vol. II, page 853.)

Mr. Gillie says:

> "Many of these northwest and southeast veins (Blue Vein Series) are simply fault fissures that so far as disclosures have been made, contain no commercial ores of any account. Others have produced commercial ores from pockets or shoots found occasionally in the vein." (See Tp., Vol. II, page 883.)

Referring to the Edith May vein in the Badger State, Mr. Sales says:

> "As to the condition of the Edith May vein in its developments from the Badger State shaft, and particularly westerly from the section of the Badger State shaft as to giving favorable promise of occurrences to the west, the unfavorable condition is that the ore shoots themselves are beginning to fail in copper. While you find the ore shoots there, the ore is the same as in the other

veins. Instead of being a copper ore, it is going to be an ore made up of zinc, quartz and iron. The copper is failing going to the west. I mean the mineralization. No, they are not commercial. I don't know just what would be the best term. You could call it a mineral shoot or a shoot of mineral deposited in the vein. I have made a general observation on all of these veins, that as you go outward from the main copper area you get into veins which are more zincy; that is, there is a transition from one end to the other. Starting in the Alice country, both the northwest veins or the blue vein system and the old Anaconda copper systems consist of the silver vein minerals, manganese, quartz and iron. That is practically all, and then when you get into that district it does not make any difference whether you are mining a northwest vein or east and west, the mineralogical character is very similar." (See Tp., Vol. II, page 918.)

Again he says:

"I do not know of any vein that points on its strike to the Alice ground from the east or southeast or the general easterly direction or that side that gives promise or looks favorable to the finding of ores beneath the Alice surface. I do not know of anything coming in from the other side, the Silver claim side, that would have any particular bearing on the Alice. They are simply veins which are regarded as silver veins, the same as all that country up there. I don't know anything of any particular importance. Outside of the low grade zinc ores that have been referred to repeatedly I know of nothing in the Alice ground or any of it that would give it any tangible value, that you could give it as a mining engineer, except a remote probability or possibility of copper. It really hasn't any great importance. I could not as an engineer place a value on it. It is purely specu-

lative; very much so." (See Tp., Vol. II, pages 920-921.)

Referring to the Blue Vein series, including the Edith May, Jesse and other veins of that character mentioned in the testimony, Mr. Gillie says:

> "Taking the veins that point towards or from any of the Alice ground, I would say they are very unfavorable going westerly towards the Alice ground, of finding ore in the Alice ground. There is nothing on any of them that would indicate to me the probability of their carrying ore in the Alice ground, except that there are productive veins in the country that continue on. There is a possibility but not a probability. I could not, as an engineer, place any value on the Alice ground because of that condition, because those veins are pointing in that direction, having in mind the developments which are upon the veins." (See Tp., Vol. II, page 935.)

All the testimony in the record, save and except the incompetent testimony of the witness Weed, heretofore referred to, shows conclusively that the silver-zinc ores disclosed in Alice ground were, at the time of the sale, and continued to be up to the time of the trial, of no commercial value whatever. They are of an entirely different character from the zinc ores of the Butte & Superior, Elm Orlu, and other zinc ores in the Butte district which, after many years of experimentation, are being successfully worked by those companies, and so refractory in character that notwithstanding the marvelous progress made in the art of metallurgy there is

no known process by means of which they can be made so.

Subsequent to purchase by the Anaconda Company, two of the greatest zinc producing firms in the world thoroughly sampled and experimented with these ores, with a view to determining their utility and obtaining leases upon the property, without success. The Montana Zinc Company at one time erected a plant of considerable magnitude and carried on an intelligent effort to successfully treat the Alice ores, but the result was a failure. (See Tp., Vol. II, page 939—Gillie) (Ryan—419, 420, 429.)

The defendants caused the ores in the Alice to be thoroughly sampled, assayed and treated in order to determine their value and the possibility of successfully reducing them. (See Tp., Vol. II, pages 888-900—Buzzo. Febles—903-908.) These samples were turned over to James L. Bruce, a metallurgist of high repute, who, after many years of experiments upon the Butte & Superior zinc ores, had attained a satisfactory method for their treatment, and the result of his tests, together with his conclusions as to the commercial value of the ores in the Alice Mine, is found in the Transcript, Vol. II, page 864-877.) Speaking of his tests, he says:

> "Those tests were necessary in order to determine whether the ores of the Alice could be treated profitably by any known processes. I found it was a very difficult ore to treat under any known process, for three reasons or four; a great deal of the mineral concentrates into the fines in crushing,

wherein it is more difficult to separate the different minerals, in fact practically impossible to separate the iron into the zinc to any marked degree; I found also that the silver did not concentrate into the lead concentrates, but that the lead concentrates ran practically the same as the crude ore; I found that a large part of the mineral was finely crystaline, so that it could not be filtered without fine crushing, and I think I have covered the principal difficulties in connection with the concentrating. I found in reducing those ores, that practically all of the silver values go into the zinc concentrates, not all, but a very large portion of them. On the ore that was treated, the ore would have no value either in the zinc ore or concentrates on any new process. (See Tp., Vol. II, pages 865-866) * * * My opinion is very distinct that the ore of the character of which Mr. Febles gave me cannot be treated at the present time by any known process or known method. There would be considerable margin between the cost of handling it and what you would realize from it at the present time. (See Tp., Vol. II, pages 867-868) * * * From the appearance of the Alice ore and my experience in handling it, I would say it is quite dissimilar to the Butte & Superior ore. There is a great deal more lead in it, and a great deal more iron. It has iron pyrite. In the Alice ores, judging from the samples I had, the silver does not concentrate into the lead concentrates. In fact, rather the reverse, while in the Butte & Superior ores, the concentration of silver into the lead concentrates is quite marked, the silver in the lead concentrates being of value, and in the case of the sample from the Alice there is no value in the zinc concentrates, while in the Butte & Superior ores, the silver, such as can be thrown into the lead concentrates, is of considerably more value than the same amount of zinc concentrates would be. (See Tp., Vol. II, pages 868-869) * * * I regard the zinc

> ores in the Alice mine as altogether speculative in value. I consider that they may have some future value. (See Tp., Vol. II, page 874) * * * I do not know of any process now that is even close to perfection to treat those ores, that would make them commercial. I cannot conceive of any tonnage being mined there that would be profitable, figuring them upon the basis of treatment of a tonnage of 500 tons a day or even a thousand tons a day." (See Tp., Vol. II, pages 875-876.)

Quite significant, as touching the value of this property, is the fact that in the year 1905 or 1906 the Walkers of Salt Lake City, who had the largest interest in the property since the year 1880, and were men of very great wealth, together with others, optioned a majority of the stock of the Alice on the basis of $1.50 per share, or of $600,000.00, for the property, and this stock was finally acquired upon that basis by the Butte Coalition Company. Intermediate this date and the sale of the property to the Anaconda Company, nothing of consequence had been developed, either in the way of the treatment of the Alice ores or in the development of the ground, which would add to its known value. It is true that the Badger State mine had produced more abundantly of copper ores than it had theretofore, but this is of no consequence in light of the testimony in the case and it is also worthy of comment in this connection that the thirty thousand shares of Anaconda stock, during the four years from the date of the sale to the date of the trial of this suit, yielded more income to the Alice stockholders than was ever yielded by the Alice proper-

ties, save and except alone the year of 1880. As to this point Mr. Gillie says:

> "As to the history of the dividends of the Alice Company, the larger portion of that was paid in the first fourteen years, 1880 to 1894, although some dividends were paid in '98, the total dividends amounting to one million and seventy-five thousand dollars. For the years 1910, '11, '12 and '13, the Anaconda Company has paid about forty millions of dollars, nearly equivalent to ten dollars a share on the thirty thousand shares of Anaconda the Alice Company owns, $300,000.00. There was forty millions paid in that period, and had the Alice acepted this proposition, they would have been doing better in four years than they did in any other period of its history, even in 1880, so far as returns are concerned." (Tp., Vol. II, page 936.)

More significant is the fact that late in 1915, under most favorable auspices, at public auction, no bidder could be found for the property at a price exceeding the consideration paid by the Anaconda Company.

IV.

THE CORPORATE BUSINESS OF ALICE HAD BECOME UNPROFITABLE AND COULD NOT BE CARRIED ON BY THE CORPORATION; THERE WERE INSUFFICIENT FUNDS TO CONTINUE THE BUSINESS AND NO MONEY WITH WHICH TO PAY EXISTING INDEBTEDNESS. THE CORPORATION WAS IN FAILING CIRCUMSTANCES AND, INSOFAR AS ITS FINANCIAL CONDITION AFFECTED ITS BUSINESS PROSPECTS, WAS IN FACT INSOLVENT.

The facts touching the history, business failure, fi-

nancial condition and inability of Alice to carry out the purposes for which it was organized are quite fully disclosed in subdivision III next preceding, to which the court's attention is particularly invited, insofar as it affects the question here involved. To repeat them under this subdivision is unnecessary.

In addition thereto, the court's attention is invited to the testimony of Mr. Ryan, Tp., Vol. I, 397-398, in which he said:

> "There had been no operations on the Alice properties, excepting leases, since 1893. After the Butte Coalition Company acquired control of the stock there was no change in the operations. The leases were carried on much the same, as they had been theretofore. No direct company operation, except taking care of the property. We could not undertake to carry on any mining operations on the property. We had no money. The Company was in debt when we took it over, and we had never seen any way of liquidating that debt. It was a non-assessable stock. We could not call on the shareholders for money, and we had no way of carrying on operations. We discussed the matter of borrowing money, offering bonds to the shareholders, but in looking into the affairs, we could not see where we were justified to ask them for any money. The mine had been worked to a depth of about fifteen hundred feet, and even with silver above a dollar an ounce, had closed down. No one had ever been able to find a process that would make the zinc ore in the mine commercial, and there has never been known to be any copper in the mine, so we did not see what representations we could make to the shareholders to induce them to put up money to carry on operations."

And Transcript, Vol. I, page 400, where he also said:

> "The Alice Company was without means, was in debt, had nothing in its plan of organization that permitted raising the money except to mortgage the property and attempt to sell bonds, and I had never considered that we had anything upon which we could base representations of the value of the property that would warrant anybody in loaning us a large amount of money."

V.

THE EVIDENCE FAILS TO DISCLOSE ANY VIOLATION OF THE SHERMAN ANTI-TRUST LAW IN CONNECTION WITH THE ACQUISITION OF THE ALICE PROPERTIES, OR OTHERWISE, BUT EXPRESSLY AND AFFIRMATIVELY SHOWS TO THE CONTRARY.

The Amalgamated Copper Company was organized in the year 1899, for the purpose of acquiring the stocks of certain mining companies operating in the Butte District. Pursuant to its organiaztion, it immediately acquired a majority of the stocks of certain of these companies. Its original capitalization was Seventy-Five Million Dollars; subsequently, this capitalization was increased to One Hundred and Fifty Million Dollars, and a few years after its organization it acquired a majority of the capital stock of certain others of the mining companies in that district.

There is not a scintilla of evidence in the entire record showing that at the time of its inception, or at any time thereafter, it was organized for any evil purpose

whatsoever, except the statement of one Thomas W. Lawson touching certain conversations he claimed to have had with Henry H. Rogers prior to the organization of the Company, which will be noticed further in the argument hereto appended.

The conduct of the Amalgamated Copper Company, as a purely business venture, from the date of its inception to the date of this trial, appears from the record to have been entirely unobjectionable.

Among the companies controlled by the Amalgamated Copper Company was the Anaconda Copper Mining Company, a corporation organized and existing long prior to the formation of the Amalgamated Copper Company. Amalgamated owned a majority of this stock. Anaconda was the largest operating company among the companies controlled by Amalgamated.

Early in the year 1910 it was decided that the physical properties of the different companies controlled through stock ownership by Amalgamated should be consolidated. Reasons essential to the very life of these mining companies and to their continued production of copper ores impelled, if in fact they did not compel, this union of physical properties. These reasons are so pointedly stated by Mr. Kelley, on pages 311-313 of Vol. I of the Transcript, that we feel justified in quoting therefrom somewhat at length:

> "I will say that the causes which led up to and resulted in the consolidation were, I think, three, primarily. The first was due to the fact that a

part of the mining companies operating in Butte had reached the point *where they could no longer produce their ores at a profit;* that condition was the result of a necessity of operating separate, independent organizations, running separate plants and hoists, maintaining separate equipment, and making their own individual development to the various ore bodies, owned by these different companies. The result was that the overhead charges were eating up a large part of the profits, and, as I say, with some of the companies it was rather a close proposition, and a close proposition so far as certain territory was concerned. It would be to the best interests of all if a plan of organization could be perfected by which the mining ground that was contiguous to one company or another as the case might be, might be worked without the necessity of each company making its separate individual development. In other words, it seemed like a waste and an unwise expenditure of money to require one concern to equip a surface plant to maintain it separately, to run up to a line and stop at the end of its property, at the end line of its property, whereas its development, its shaft, its crosscuts, its laterals and its surface equipment, were completely adequate to enable that company to proceed and take out the ore and to require another company operating the property contiguously to have its separate plant, and its separate development, and run up, say, to the other side and stop, at its line. Now, that was one cause. The second cause, or the reason that led to this consolidation, was the increasing number of underground mining conflicts that could not be equitably and legally adjusted as between these different companies without the expenditure of an enormous amount of money, from which no good could come. In explanation of that I want to say that in certain districts in Butte, the prospecting development had shown a large number of veins that were not prof-

itable or productive near the surface. Now in order to determine absolutely the ownership of those veins, it would be necessary for the different corporations, owning them separately, to have developed the apex by raising through an absolutely unprofitable portion of the vein to reach the apex, and then opening up the apex, and disclosing it with reference to the exterior boundaries of the different mining companies or claims owned by the different companies. All of that work would have been dead work; it would have cost a large amount of money and as I say, would not have been productive so far as anybody realizing from the actual doing of the work. The third reason that led to the consolidation, was the desire to so consolidate these properties that the very heavy burden, the exploration and development might be carried on for the joint benefit of all of the different companies. For instance, these properties lay—I am not speaking with reference to the Alice properties, because that was an after thought, I think it had no part in the original consolidation—but often times property lay contiguous, the property of one company was contiguous to the property of another company. Now, it cost a great deal of money to prospect and develop and open up these mining claims, and there was not any fair or equitable way in which that charge could be distributed among the different companies. If the Anaconda Company, for instance, had begun an extensive exploration, and found a vein, although it might have been profitable for the Butte & Boston Company, there was no way of dividing the expense, and it was the different complexities that came about in the operation of these different mining companies as separate units that led to the consolidation of the physical properties. I think that is a fair statement of it."

Again, on page 314, Vol. I of the Transcript, Mr. Kelley says:

> "If twenty different companies operated at Butte, independently the expense would be immeasurably greater than if one company operated all of them, *and a good many of them could not be operated at all.*"

And again, on page 315:

> "The economies in operation have necessarily been great in order that operations may be carried on at all."

Shortly after the consolidation and purchase of the physical properties of these companies by the Anaconda Copper Mining Company, the Anaconda Company also acquired certain properties belonging to W. A. Clark, known as the Clark properties, and also acquired the Alice properties—the acquisition of the Alice property was, as stated in the foregoing by Mr. Kelley, an after thought. The continued acquisition of mining properties by the Anaconda Company was absolutely essential in order to continue its life. It was carrying on its mining operations at a rate of from ten thousand to fourteen thousand tons a day. Necessarily, the result was depleted ore reserves. Notwithstanding its acquisition of mining properties, in the year 1910 the ore reserves of the properties controlled through Amalgamated were not as great as they were in 1899. On page 942 of Vol. II of the Transcript, Mr. Gillie says:

> "Every mine has an end, and in order to prolong the life of a mining company it is necessary to ac-

quire additional property. That would be the first thing. Since 1899 the Amalgamated Copper Company (Anaconda) has been mining ore at the rate of about eight to ten thousand tons a day, and for the last seven or eight years we have been mining at the rate of thirteen to fourteen thousand tons a day. As to the comparison between the depletion and the acquisition of ore deposits since 1899, in the amount of copper they would control, well, no, they haven't added as much in the way of ore reserves as they have exhausted during that period. * * * I am afraid the Amalgamated has not kept pace with its production. It has exhausted its resources so far as its metals produced are concerned."

The United Metals Selling Company was incorporated about 1899. At that time it took over the business of Lewisohn Bros. as a going business. It engaged in the selling and distribution, in the markets of the world, of the copper production of such of the Butte companies as were controlled by Amalgamated, as well as other of the Butte companies, and also of copper produced elsewhere in the United States.

The stock of this Company was acquired by Amalgamated in 1911. It was a legitimate business enterprise, and it was only through it, or some like company, that the copper production could profitably be disposed of. The necessity for the distribution of copper in this manner is made apparent by the testimony and the character of its operations as touching producer and consumer, its selling of copper being actually from the producer to the purchaser, is disclosed by Mr. Ryan,

pages 408-410, Vol. I of the Transcript, and by Mr. Evans, page 282, Vol. I of the Transcript. Touching the necessity for organizations of this character, Mr. Evans said:

> "The reason for a metal selling agency is that it is almost necessary to have a large amount of copper at your disposal, have it at different places in the world, have it marketable and ready for delivery. The metals selling agency sells at the point of delivery. I would say that it is necessary to have an organization that can be kept in constant touch with the conditions that affect the price of copper all over the world. It would be impractical and very difficult for independent or separate producers to maintain such agencies."

Neither the Amalgamated Copper Company, nor the Anaconda Copper Mining Company, nor the United Metals Selling Company ever controlled either the sale or the production of a major portion of the copper production of the United States alone, and the proportion of the world's production controlled by them, or either of them, was relatively small. Neither did the entire Butte district, in the year 1899, or at any time thereafter, produce a major portion of the copper produced in the United States, and the relative proportion between the copper produced in the Butte Camp and the production in the United States, as well as in the world at large has, since that date, constantly decreased.

From the record, it does not clearly appear what part of the copper production of the United States, or of the world, was controlled by the Amalgamated,

through stock ownership, about the time it came into existence, and after it acquired the control of the Boston & Montana and Butte & Boston Companies. From a mass of statements by counsel, and incompetent testimony, it would appear that probably about thirty-five per cent of the copper of the United States, and about one-fifth of the copper of the world, was produced by these stock-controlled companies. (See Tp., Vol. I, page 290; Vol. II, pages 713-714.) This is, however, not very material, for it does appear from other more or less competent testimony, but the only testimony which Appellants deemed it essential to introduce, that in the year 1910 the copper production of the United States amounted to 1,086,151,430 pounds; that the total copper production of Montana was 288,449,425 pounds. From the Montana production there must be deducted, as produced by independent producers, at least 52,000,000 pounds (See Tp., Vol. I, pages 291-292), leaving the production of the Anaconda Copper Mining Company, after it had taken over the physical properties belonging to Clark, the Red Metals Company, the Butte Coalition, and all the physical properties of the companies which had theretofore been controlled by Amalgamated, through stock ownership, at the amount of 232,449,420 pounds, being only twenty-one and one-half per cent of the production in the United States, and a much smaller per cent of the world's production; and it is worthy of note that ever since the inception of the Amalgamated Company, the proportion of copper produced by the companies controlled by it, through stock ownership or otherwise, to the production in the United

States, and in the world, had been, up to 1910, and ever since has been, constantly decreasing.

In 1910, the United Metals Selling Company handled from one-fourth to one-third of the copper production of the United States. (Tp., Vol. I, pages 408-409.)

The evidence not only fails to show that either the Amalgamated or the Anaconda Company has controlled the price of copper in the markets of the United States or the world, or has made any excessive or unreasonable profits, or has indulged in any discrimination in prices to destroy competitors, or in fixing of prices, or has limited its output, or has treated unfairly any others engaged in the copper business, or indulged in unfair business policies of any kind, or unfair treatment of employes, or has monopolized any commodity necessary in the mining, production and reduction of copper ores, or has controlled to any extent transportation facilities, or has attempted by unfair methods to prevent competition, either in the production or sale of copper, or ever did any act or thing, or attempted to do any act or thing injurious to the public welfare, but the evidence distinctly shows to the contrary upon each of the foregoing. The testimony shows that the Alice properties acquired by the Anaconda Company are neither actually nor potentially copper producers. This point is thoroughly discussed in subdivision III above and the testimony upon the same will not be here repeated.

VI.

FINDINGS OF COURT.

(a) The court in its decision refrains to expressly decide the questions raised in reference to the Sherman Anti-Trust Law, but it almost directly, and certainly impliedly, finds that the complainants in this case could not rely upon the same for the purpose of rescinding and setting aside the sale of Alice properties to the Anaconda Company.

(b) The Court found that the Alice Company was ripe for dissolution and distribution of its assets to its stockholders; that it was under no obligations to further borrow money to carry on its business, and that under the common law the majority of the stockholders had the right to sell and dispose of its property.

(c) The Court found that on account of unity of control between Alice and Anaconda the burden rested upon Anaconda to show that the price paid for the property was adequate, and further found that this burden had not been discharged and that the consideration paid therefor was inadequate; and further found that an arbitrary price was prima facie inadequate; and, further found that there was no market value for such a property as the Alice, and that the price of such properties is in any event purely arbitrary.

(d) The Court seems further to have found that while the Alice Company might have taken stock in the Anaconda Company in exchange for its property, with the view to the sale of the stock and distribution of its

proceeds, that Alice could not acquire Anaconda stock under the circumstances of this case, evidently intending to hold it; that there was no intention on the part of Alice, at the time of the transfer, to dissolve the Company and distribute its assets.

Notwithstanding these findings of the Court, the Court provided a method which, in its judgment, was sufficient to correct the error in the proceedings theretofore had, protect the rights of both the minority and majority stockholders of the Alice Company, and under certain contingencies vest title to Alice properties in Anaconda Company, all of which is disclosed in the decision and the decree rendered in this cause.

VII.

GENERAL CONTENTIONS OF APPELLEES UPON THIS APPEAL.

(1) Appellees contend that upon the record in this case the findings of fact and conclusions of law upon all essential controverted questions should have been in favor of the Appellees, and that a final decree, without interlocutory, should have been unconditionally given in their favor, refusing all relief prayed for by complainants and affirming the sale of Alice properties to Anaconda.

(2) That even though the findings of fact made by the Court be not disturbed, and be held by this Court to be justified by the testimony in the case, the decree of the Court is nevertheless correct, and should in all respects be affirmed.

ARGUMENT.

I.

INTRODUCTORY STATEMENT.

We shall first address ourself to the question stated in subdivision (1) of Title VII, that upon the record in this case, findings of fact and conclusions of law upon all essential questions should have been in favor of the Appellees; that no interlocutory decree, but a final decree, should have passed unconditionally in their favor, refusing all relief prayed for by complainants and affirming the sale of Alice properties to Anaconda.

No complaint is made as to regularity of any formal proceedings by which the conveyance in question was authorized. A directors' meeting, properly called and held, adopted a resolution authorizing a contract of sale in the manner thereafter carried out, and calling a stockholders' meeting for the purpose of considering and ratifying such action of the directors. Due notice of this meeting was given, the purpose thereof being fully set forth in the notice which was accompanied by a circular letter setting forth in detail the proposed transaction.

At the stockholders' meeting there were represented 295,100 shares, out of a total of 400,000 shares of the capital stock of the Company. The sale was authorized and ratified by a vote of 289,590 shares of the stock of the Company, as against 5,510 shares voting against the proposition. Of the stock voting in favor of the

transaction, amounting to over seventy-two per cent of the capital stock of the Company, 234,215 shares, or about fifty-eight per cent of the total capital stock, were the property of the Butte Coalition Company, although not standing in its name upon the books of the Alice Company. The 5,510 shares voting against the proposition were owned by Baer, Walker and Geddes, complainants herein. The stockholders' meeting was held May 27, 1910, and the deeds of conveyance were executed, and it was not until November, 1911, eighteen months after the stockholders' meeting had been held, that this suit was instituted, and before this suit was instituted regular and proper proceedings had been taken by the Board of Dierctors and stockholders of the Alice Company authorizing a distribution of all its property to the stockholders and the dissolution of said Company.

As we understand Appellants, it is contended that the sale should be set aside because under the laws of the State of Utah a conveyance of all of the property of the Alice Company could not be made without the consent of all the holders of its stock, and because the consideration for the sale was capital stock of the Anaconda Copper Mining Company, and because of the claimed identity between the seller and the purchaser, and because the consideration was inadequate, and because the acquisition of the Alice property by the Anaconda Company was in contravention of the Sherman Anti-Trust Law.

The circumstances under which private corporations may sell and dispose, by absolute conveyance, of all of their property, are clearly stated in Thompson on Corporations, Second Edition, Section 2429, as follows:

> "First: Private corporations, when expressly authorized by statute, charter or by-laws, may sell and dispose of all the corporate property;
>
> "Second: Private corporations, by the unanimous consent of all stockholders, in the absence of expressed prohibition, may sell and dispose of all corporate property;
>
> "Third: The directors and managing officers have the power to dispose of all the property where the governing statute provides that private corporations may sell their entire property;
>
> "Fourth: Where the corporation is in failing circumstances, or, is in fact insolvent, the directors and managing officers may dispose of all the property or make an assignment of all corporate property for the benefit of creditors;
>
> Fifth: The majority stockholders may alienate all the corporate property when expressly authorized by statute, charter or by-laws;
>
> "Sixth: The majority stockholders, even as against the protest of the minority, may dispose of all the property when the corporate business has become unprofitable and where it would be ruinous to the corporation and the stockholders to continue the business; *or,* when there are insufficient funds to continue the business and no money with which to pay existing indebtedness; *or,* when the corporation is in failing circumstances, or is in fact insolvent."

The Alice Company, at the time of the sale in question, had the authority to dispose of all of its property in the manner employed; (a) because it was expressly

authorized by statute to do so; (b) because it was expressly authorized by its charter or articles of incorporation to do so; (c) because at the time of the sale the Alice Company was not, and had not been for many years, a going corporation; it did not have sufficient funds to continue its mining business, and had no means of raising sufficient funds to carry on the same, and had no money with which to pay its then existing indebtedness.

II.

A CONVEYANCE OF ALL THE PROPERTY OF THE ALICE WAS EXPRESSLY AUTHORIZED BY THE STATUTORY LAW OF THE STATE OF UTAH.

Section 322 of the Compiled Statutes of Utah of 1907, in force at the time of the transaction in question, which section is quoted in full in Appellants' brief, page 58, among other things, provides as follows:

> "* * * And any corporation now existing, or that hereafter may be organized under the laws of this State for the purpose of mining, or the exploration or development of mining property, including lands bearing metal, stones, limestone, oil, petroleum, asphalt and other hydrocarbons, shall, in addition to the powers above enumerated, have the power to purchase, take on bond or lease, or in exchange, or locate, or otherwise acquire any lands, mines, options, territory, fields, or claims, and to sell, convey, lease, bond, mortgage, dispose of, or otherwise deal in the same to such extent as the board of directors may deem prudent, subject always to the provisions of the articles of incorporation and

> by-laws; provided, that in case the articles of incorporation do not provide for the sale or other disposition of the property of the corporation, then the act of the board of directors shall not be valid or binding on the corporation until confirmed by a vote of a majority in amount of the stock outstanding at a meeting of the stockholders duly called to consider such action of the board. When the articles of association provide that the property of the corporation may be sold, mortgaged, or otherwise disposed of by the directors or by the stockholders, sales made in accordance therewith shall be binding on the company."

The provisions contained in the foregoing statute, that a mining company may sell, convey, lease, bond *or dispose* of its property, *or otherwise deal in the same to such extent as the Board of Directors may deem prudent,* subject to the provisions of the articles of incorporation and by-laws, and provided that in case the articles of incorporation do not provide for the sale or other disposition of the property of the corporation, then the act of the Board of Directors shall not be valid or binding upon the corporation until confirmed by a vote of a majority in amount of the stock outstanding at the time of the stockholders' meeting called to consider such action of the Board, provide plain, direct and unequivocal authority by the Board of Directors to make a sale of all the property of the corporation, provided the articles of incorporation authorize them to do so. In the event of the articles of incorporation failing to contain such authority, it is provided that such sale is subject to the subsequent confirmation by a vote of a

majority in amount of the capital stock outstanding at the meeting of the stockholders called for the purpose of considering such action before it becomes binding.

The significance of the language "dispose of or otherwise deal in the same to such extent as the Board of Directors may deem prudent," and the language "sale or other disposition of," used in this statute, is pointed out by Appellants in their brief, on pages 51 and 52, wherein is contained an implied admission that this language contemplates power in a corporation to sell and dispose of all of its property, and indeed the same cannot be successfully controverted.

The foregoing statute necessarily carries with it the meaning above suggested, otherwise there would be no purpose in its enactment, and it would be without effect and without meaning. At common law, the Board of Directors of a corporation are authorized to sell, lease, mortgage or otherwise dispose of the property of a corporation, subject to the limitation that they cannot sell or dispose of the entire property of the corporation. It can hardly be contended that the above statute was intended as a limitation upon the power of the Board, but rather from its terms and the language employed, it must be construed to be an extension of the power already possessed. If it was intended to limit the power of the Board, it would have been idle to have suggested that the action of the Board of Directors in selling the property of the corporation was not effective unless confirmed by a majority of the stockholders, and that

of itself is an extension of the common law power. It follows, therefore, if the Utah statute is to be given any force or meaning whatever, it must necessarily be held that the common law power of the Board of Directors was extended, and that with the consent of a majority of the stockholders, the directors of a mining corporation could, as a matter of fact, dispose of all the property of the same.

Language such as is employed in this statute will not be so construed as to become a grant of power only which already existed. The clear intent to extend the power of the Board of Directors of the corporation and of its stockholders is manifest, and the language employed well-adapted for this purpose.

It is our contention that it is immaterial that this act was not in force at the time of the incorporation of the Alice Company, for the reason that at the time of the incorporation of that company in 1880, there was in force the following statutory provision, adopted by the Utah Legislature on February 20, 1874, as follows:

> "The Governor and legislative assembly may hereafter modify or repeal this act, but if it be repealed, or if the franchise of any corporation organized under this act, shall be forfeited, the corporation may continue for the purposes specified in section 9 of the act, to which this is an amendment."
>
> Compiled Laws of Utah, 1876, page 232.

Subsequently, upon the adoption of the Constitution of the State of Utah, a repeal, alter and amend provi-

sion, governing the charters of corporations, was made a part of the fundamental law, and is found in section 1 of article 12 of the Utah Constitution.

There can be no question but that the territorial repeal provision, as above set forth, in its terms was broad enough to cover, and plainly covered, such a change in the statutory law affecting corporations as is found in section 322, supra, and as this subsequent act authorizing a corporation to dispose of all of its property is plainly within the provisions of the repeal act of 1874, it must be held applicable to the present situation, unless such holding would render the repeal provision repugnant to the Constitution of the United States.

It is counsel's contention, as we understand it, that because of constitutional limitations, the modifying and repealing act must be construed to have been intended to apply only to such changes in the statutory law affecting corporations as affected the contract between or the rights of the corporations as between it and the state, and cannot be construed to apply to the implied or express contracts existing between stockholders of a corporation and the corporation, or between the stockholders themselves, and that a provision, affecting the right of a corporation to dispose of all of its property would impair or seriously affect the implied or express contracts existing between the stockholders themselves or the stockholders and the corporation.

The very question herein presented was before the Supreme Court of the State of Montana upon a statute very similar to the one in question, in the case of

Allen vs. Ajax Mining Company, 30 *Montana, page* 490.

In that case the constitutionality of the act of the Legislative Session of 1899, known as House Bill No. 132, if attempted to be applied to corporations formed before the passage of the act, was before the court for determination. The facts in the case were as follows:

Plaintiff commenced an action in the District Court of Lewis & Clark County to secure an injunction restraining the defendants from disposing of certain mining porperty belonging to the defendant, Ajax Mining Company, a Montana corporation, to the National Prospecting and Development Company, a New Jersey corporation. The National Prospecting and Development Company had made a proposal to purchase all of the property of the Ajax Mining Company, paying in consideration therefor forty per cent of the capital stock of the New Jersey company. After consideration of this proposal the defendant directors passed a resolution calling a meeting of the stockholders of the Ajax Mining Company, for the purpose of considering the question of accepting such proposal to purchase and acquire all of the property and assets of every kind belonging to that Company upon the terms proposed, and directing notice of such meeting to be given, as required by law. Before the

stockholders' meeting the plaintiff, who did not consent to the sale, instituted an action to secure an injunction. Upon the authority of the MacGinniss case the District Court issued an injunction, an appeal was taken, and the question under consideration received full discussion. The Court arrived at the following conclusion (see page 505):

> "It cannot be said then, that the enforcement of the provisions of House Bill 132 will impair the obligation of any contract which the plaintiff entered into when he became a stockholder of this company, for the reason that the reservation of this authority to alter, amend or repeal the law under which the company was organized became as much a part of the law of its creation as any other provision respecting it, and became a part of the charter, modifying what would otherwise have been an absolute grant. (Citing 4 Thompson on Corporations, Section 5408).
>
> "It is to be understood, too, that this reservation possesses equal vigor, whether contained in the charter of the particular corporation itself, or in the Constitution or general laws of the state under which the corporation is organized. While there may be some slight conflict in the authorities, the great weight of authority clearly and unequivocally sustains such statutes. (Citing many cases.)
>
> "The theory upon which these statutes are upheld is that whatever rules or regulations for the management, operation or control of a corporation which the legislature might have incorporated in the law under which the corporation was or-

> ganized may afterwards properly be engrafted on its charter by virtue of this reserved power existent at the time of the formation of the corporation." (Citing many cases.)

It was accordingly held that the statute was constitutional.

Section 67, Thompson on Corporations, is as follows:

> "But if the power to alter or repeal is reserved in the incorporating act or otherwise, as above stated (by the Constitution or a general statute), the legislature may make such alterations or amendments as it may see fit, and the judicial courts shall have no power to consider their propriety."

The view that the reserving clause is for the benefit of the State was set forth in Zabriski vs. Hackensack, Etc. Ry. Co., 3 C. E. Green, 178; 90 Am. Dec. 617, by Chancellor Green, and the dissenting judges in the sinking fund cases took a similar view. Chancellor Green in the Zabriski case, cited supra, concedes, that the great weight of authority is against his view as to the purpose and effect of the reservation. See also on page 624:

> "This view of the case is so clear upon principle that I feel constrained to be guided by it, although the weight of decisions in other states is against it."

In Thompson on Corporations, Section 90, it is said:

> "The reserved power of the legislature extends not only to altering the charter, for any purpose

> connected with the public interests, but also to altering it for the mere purpose of changing the rights of the corporators as among themselves. This view has been taken in New York, in Massachusetts, in Illinois, in Missouri, and in other states. A necessary result of this doctrine is that the legislature may authorize any change in the organization, purposes or powers of the corporations which the majority may desire, contrary to the will of the minority."

In the case of Schenectady & Saratoga Plank Road Company vs. Thatcher, 11 N. Y. Court of Appeals, 114, the court was required to determine whether, under a similar reservation, a subscriber was released from his subscription by reason of an increase of the capital and the construction of a branch road in pursuance of an act of the legislature amendatory of the original act of incorporation. Under the decision above referred to, see particularly those cited in Keane vs. Johnson. This change was so fundamental in character that it would have released the subscriber at the common law. The court, by Johnson, Judge, says:

> "This condition (referring to the reservation of the right to alter, suspend or repeal), is thereby engrafted upon the original constitution of companies formed under this act. The subsequent act was passed and operates under that reservation of power to the legislature. The corporate property is subject to that power by reason of the assent to its exercise implied from and by an organization under the act which reserves it. Every-

> one who entered into such company is aware of the reservation of power and of the possibility of its exercise, and trusts, as in many other matters he must trust, to the wisdom and justice of the legislature, that this power will not be abused. * * * The persons who contract to take shares in a company under such an act, contract subject to the same reservation of power. The courts are bound to read their agreement with the legislative condition. They agree to take and pay for the shares for which they subscribe, subject to the power of the legislature to alter or repeal the charter of the company, and it does not lie in their mouths to complain that the power has been exercised."

So in the case of Buffalo & N. Y. Cent. R. R. Co. vs. Dudley, 4 Kernan, 575, the Court of Appeals of New York again held that it was no defense to an action upon a subscription for stock, that the name of the railway had been changed, and an extension of the road made under legislative authority amendatory to the act under which the company was incorporated, where the power to repeal, alter or amend had been reserved, the court saying:

> "The subscription having been valid, so as to give a right of action in case of non-payment to the corporation, did the alteration of the charter and the extension of the road subsequently absolve the defendant from his liability upon such subscription? This question is, I think, entirely settled by the decision of this court in the case of Schenectady & Saratoga Plank Road Company vs.

Thatcher, 11 N. Y. 102. The right to alter was reserved in the charter, and the subscription must be taken to have been made subject to having such additional powers conferred as the legislature might deem essential and expedient. The change is not fundamental. The new powers conferred are identical in kind with those originally given. They are enlarged merely, the general objects and purposes of the corporation still the same. It may be admitted that under this reserved power to alter and repeal, the legislature would have no right to change the fundamental character of the corporation and convert it into a different legal being, for instance, a banking corporation, without absolving those who did not choose to be bound. But this they have not attempted to do. The additional powers are of the same character, and have been regularly acquired from the legitimate source of power, and if they have been fairly exercised, the defendant, although the change may have operated to his pecuniary disadvantage, is still bound by his undertaking. It is no breach of the agreement between the plaintiff and the defendant. It might, perhaps, be inferred from some expressions in the opinion of Parker, Judge, in Schenectady & Saratoga Plank Road Company vs. Thatcher, supra, that that case turned in some measure upon the fact that there was no suggestion or proof of injury to the defendant's interests resulting from the change complained of. It is obvious, however, that the decision was not based upon any such consideration. It is manifestly a question of power, and if the power was legitimately acquired, and has been exercised without fraud, the rights of the parties are in no respect changed as between themselves, whether the alteration is beneficial or injurious to the defendant's interests. Whether he has made or lost by the

change in no respect affects the question of authority in the plaintiff."

The subject receives a very full and a very satisfactory discussion in the case of Durfee vs. Old Colony & Falls River Ry. Co., and others, 5 Allen (Mass.) 240, to which opinion we respectfully call the Court's attention, and to the many cases cited therein.

See also:

Looker v. Maynard, 179 U. S. 46;
Veener v. United States Steel Co., 116 Fed. 1013;
Market St. Ry Co. v. Hellman, 109 Cal. 571;
Williams v. Nall, 108 Ky. 21; 55 S. W. 706;
Missouri R. R. Co. v. Kansas, 216 U. S. 274.

Under the foregoing cases it is very plain that so far as Section 322 of the Compiled Statutes of Utah is concerned, the extension of power therein conferred to mining corporations which permits a sale and disposition of the entire property, upon such sale being confirmed by a majority of the stockholders, was a constitutional exercise of the power reserved by the legislature, and one of which the complainant may not complain.

The Appellants contend that so far as a Utah corporation is concerned, this question is foreclosed by the decision of the Supreme Court of Utah in the case of Garey vs. St. Joe Mining Company. Appellants misconstrue the scope and force of this decision. It is not a precedent for the instant case. The question before the

court was the right of a corporation, organized before the passage of the statute under which the proceedings were sought to be taken, to amend its articles of incorporation, which, as originally filed, contained an express provision that the stock should not be assessable by making provision for assessing the capital stock. At the time of the organization of the corporation the stock was expressly declared non-assessable unless the articles provided that it should be assessable, and it was also provided that it could not thereafter be made assessable without the consent of all the stockholders of the Company. The subsequent statute provided that the stock might be made assessable by a two-thirds vote of the stockholders. The court held this provision of the later statute violative of the provisions of the Constitution of the United States, and further held that the provisions in the charter contained a contract between the corporation and its stockholders which, without violating the constitution of the United States, could not be impaired or changed. While the court did not perhaps take the broad view of the right to amend or repeal taken by our Montana Supreme Court, it did recognize the rule that when the corporation was organized with a statute in force providing for the amending or repeal of the charter in force, that provision constituted a part of the contract between the state and the corporation, the corporation and the stockholders and the stockholders and the state, and it plainly held that where any public right was con-

cerned, a full right to amend or repeal was given, and beyond this, in defining what changes could be made, the court was very guarded in its expression.

The case is easily differentiated from the present one. In the first place the statute which we are now considering was not reviewed, neither has it ever been by the Supreme Court of Utah to our knowledge. In the second place, the reasoning by means of which the Supreme Court of Utah came to its conclusion is not at all applicable to the present one, and an analysis of the decision will clearly show that had this been the question before the court the decision would have been otherwise. The controlling elements in this decision were that by the amendment to the Utah law and the action of the stockholders, the stock of the stockholders, their own personal and private property, as differentiated from the property of the corporation, was rendered liable to forfeiture; that the stockholders were, in order to prevent this forfeiture, compelled to contribute more capital to the croporation than they had agreed to contribute; and that an express agreement had been entered into between the stockholders and the corporation in its articles of incorporation which could not be violated. None of these reasons have any application to the question which we are now considering. The gist of the reasons for the decision is well settled, stated as follows:

> "It must be conceded that the full-paid capital stock became the private property of the stock-

> holder. As between himself, the corporation, and his co-corporators, he paid the full consideration therefor, and paid all that was agreed by him to be paid. To now say that the Legislature, in face of such an agreement as was here made by the corporators, may authorize a majority to compel a dissenting minority to buy it over again, not only once, but as many times as they may, in good faith, determine, by the enforcement of additional contributions of capital for mere corporate purposes, and to make a sale of their stock, resulting in a forfeiture of all their rights and equities in and to the assets of the corporation, if the unwilling members do not see fit to yield to such compulsion, *is conferring a power which gives to the majority the absolute dominion over the private property of the stockholders, permits a disturbance of vested rights, and the impairment of contract obligations, within the protection of the federal Constitution.*"

The court clearly differentiated that case from the present one by the following language:

> "As the authorities say, this limited liability is a part of the corporate privilege conferred by the state, and the right to repeal the franchise itself includes the right to repeal any part of, or altogether, the franchise or privilege of limited or *non-personal liability*. The immunity of such liability to the corporators existed in the first instance only because the state had granted it to them, and what it has granted it may, under its reserved power, take away or modify."

The manner of the disposition of the property of a corporation is non-personal so far as the stockholder is concerned. The right to hold property is of the very essence of the grant of the state to the corporation, with-

out which grant it could not take any title whatsoever. The state having granted this right to the Alice Company under the repealing clause of the statute in force at the date of its organization, it had the right to regulate the manner in which it should so hold it, and the manner under which it might dispose of it. The change touched the corporation only and was non-personal in its character.

The court also laid much stress upon the proposition that the non-assessable character of the stock was made a part of the written agreement between the stockholders by the articles of incorporation, and refused to decide whether, if it should not have been the case, the judgment of the court would have been otherwise. Among other things it said:

> "In the Rhode Island case the court seems to hold a contrary doctrine, though in that case it is not made to appear that the full-paid capital stock was made non-assessable by the original articles of incorporation, and in that respect the case may be distinguishable from the Nebraska case and the case at bar."

Again it said:

> "The questions as to whether, under the enactment of 1903, two-thirds of the stockholders, or a majority, under the enactment of 1905, are legally empowered to authorize a levy of assessments on full-paid capital stock against a dissenting minority when the original articles place no prohibition on the levying of assessments, or contain no stipulation on the subject, * * * are not now before us. Confined to the question which is before

> us, we think the demurrer ought to have been overruled."

The assumption of Appellants that this decision, if in point, foreclosure the consideration of this question by the courts of the United States, is also unfounded. The question before the Supreme Court of Utah was whether or not the statute granting authority for the assessment of the stock was in contravention of the Constitutition of the United States, and therefore involved a construction of the provisions of the Constitution of the United States touching thereon. The provisions of the Constitution of the United States were so construed by the Supreme Court of Utah as to render the statute of the State of Utah relied upon inimical to these provisions. That court did not restrict the operation of the statute of the State of Utah so as to make the same conform, by its construction, to its understanding of the meaning of the provisions of the Constitution of the United States, but held that the Constitution of the United States prohibited the enactment by the Legislature of the State of Utah of the particular statute relied upon. Thus a federal question was involved, was not foreclosed by the decision of the Supreme Court of Utah, and cannot be foreclosed by the same, and that court took this view of the matter. In speaking of the contentions of the parties, the court said:

> " * * * and (2) if it were intended by the Legislature to confer such a power, the right so to do was not within the reservation of the Con-

> stitution, for that it was violative of the federal Constitution, prohibiting states from impairing the obligations of contracts *and the taking of property without due process of law.*"

Speaking of the power of the Legislature:

> "When reasonably exercised, such legislative enactments do not fall within the prohibition of the federal Constitution."

Again:

> "* * * and a legislative enactment which confers such a power is, in our judgment, an impairment of the obligation of a contract which is protected by the federal Constitution."

In the opinion upon rehearing, speaking of the whole question before it, the Court said:

> "As the United States Supreme Court is the ultimate authority upon the question as to when such rights are invaded, we need not again refer to the state courts or the books of the text-writers."

When the reason given by the court which has limited this amending and repealing right on constitutional ground is considered, it is plainly seen that the Utah court has not placed itself upon record as being in opposition to the holding in the Ajax case, supra. The reason behind these limitations placed upon the altering and repealing constitutions and statutes is not based upon a construction of their language, and particularly could not be so placed in the case of the Utah Constitution or the Act of the Legislature in force before the

adoption of the Constitution, as the language is broad enough to include every change which the Legislature might see fit to impose upon every right or contract of the corporation. The limitations are upon the ground that neither the Constitution nor the Legislature would have the right to grant an authority authorizing the impairment of certain rights or contracts, and therefore, these repealing Constitutions and statutes must be construed to have meant only such contracts and rights as the Legislature, without violating the federal Constitution, had power to change. Therefore, if the Utah Legislature had power to amend its statute by giving a corporation, as against the dissent of a minority stockholder, the right to dispose of all of its property, or if the state or the public could be reasonably said to have any interest in such amendment, then it must be conceded that the Legislature had full power to make section 322, supra, applicable to corporations organized before that time.

The sole ground upon which the general rule referred to by Appellants, that a going corporation cannot dispose of all its property without the consent of all its stockholders, is based, is that to permit this to be done would be to prevent the corporation from carrying out the purposes of its organization, and thus destroy its existence. Therefore, if the Legislature had power under the repeal provision to terminate the existence of a corporation at any time, it must be granted that it had the power to authorize a majority or two-thirds of

the stockholders to take steps which would accomplish the same purpose. That under the repeal statute, existing at the time of the organization of the Alice Company, and the subsequent provision of the Constitution of that State, the Legislature of Utah had power at any time to repeal and set aside the charter of any corporation theretofore formed while the act was in force, is well settled by the authorities. See:

Thompson on Corporations, 2nd Ed., 414-411, and cases cited;
Cook on Corporations, 7th Ed., Vol. 2, Sec. 639, page 1972, and cases cited;
Greenwood v. Freight Co., 105 U. S., 13.

The Legislature clearly having power to absolutely repeal and annul the charter of the Alice Company, and the Legislature having granted the right to the Alice Company to hold property, the very essence of the purpose for which it was organized, how can it be said that the Legislature would not have power to provide for a proceeding by stockholders resulting in the ultimate termination of the existence of the corporation, or to regulate in any manner, which did not result in the destruction of the corpus of the property or its forfeiture or confiscation, either the acquisition or the transfer of the same?

Again, under the language of the Garey case, if the proposed change were one in which the public or the state would have in interest, there could be no objection to its exercise. How can it be either reasonably or

plausibly urged, having in mind the fact that one of the well-settled purposes of the altering and repealing statute and the Constitution of the State of Utah is to give the State the right at any time to terminate the charter of a corporation, that the state and the public are not directly interested in a provision that permits a corporation, through the action of a majority or two-thirds of its stockholders, to dispose of its property and retire from business when they see fit. Many reasons might be cited where the public welfare in particular cases would be promoted by such a change, and why the right to make the same may not become a part of the public policy of the state to its great benefit and advantage, but these will suggest themselves to the court, and in any event, the state has delegated to the corporation a right to do that which the state could unquestionably do under the alter and repeal provision of the Utah statute.

Neither in the Utah case nor any other cited by appellants that we have been able to find, is there a suggestion that a Legislature has not full right under the amending and repealing provisions to provide for a disposal by a corporation of all of its assets, and on the contrary we have the Ajax case, supra, well reasoned and directly in point, and supported in principle by almost numberless authorities, holding that the state clearly has that right; and we submit that the extension of power conferred by Section 322 of the Utah Statutes, conferred upon the Alice Company the right to dispose

of all its property upon such sale being confirmed by a majority of its stockholders, and was an exercise of the power reserved by the Legislature and not obnoxious to any provision of the Constitution of the United States.

The suggestion that Section 322, as amended by the laws of the State of Utah of 1905, is unconstitutional, because the amendatory act contains more than one subject, is without force. The Act relates in its entirety to the powers of corporations, and all its provisions are germane to the title. It is said that the title gives no intimation that mining corporations are to be invested, by the amendment, with any powers other or different from corporations generally. Mining corporations were not treated, in the laws of Utah, separately from other corporations, and were included within this general term. There was no special chapter upon this subject. Due notice was given by the title of an amendment to the sections of the statute touching the powers of corporations, which authorized the Legislature to amend the powers of a mining corporation as well as the powers of any other corporation. It is unnecessary to pursue this subject. The objection of Appellants, and the basis thereof, is not made clear in their brief, and no authorities whatever are cited in support of their contention. Under such circumstances it is not thought that the question invites serious consideration.

III.

BY CONTINUING ITS CORPORATE EXISTENCE AND BUSINESS AFTER THE YEAR 1898, THE ALICE COMPANY BECAME IRREVOCABLY BOUND BY SECTION 322 HEREINBEFORE CITED.

Aside from the consideration of said Section 322 of Compiled Statutes, in connection with the repealing act passed in 1874, we submit that Section 322 is clearly applicable to the Alice Company under the provisions of the following Act of the Utah Legislature. Section 353 of the Revised Statutes of Utah of 1898 is as follows:

> "Rights and duties continued. Every corporation heretofore lawfully organized under any law of Utah, and existing at the time of the taking effect of this revision, shall continue in existence with all the rights, privileges, powers, duties and obligations conferred or imposed by the laws under which it has heretofore existed, as modified or controlled by the provisions of these statutes."

This section in exactly the same form is found as Section 353 of the Compiled Laws of Utah of 1907, in which compilation is also found Section 322 above discussed. Under this provision any corporation organized before the adoption of Section 322, was made subject to the provisions of that section, if it elected to continue business. If it did not desire to be controlled by the provisions of Section 322 it, of course, had the option of surrendering its charter and discontinuing business. Having elected to continue business it must have been held to have irrevocably consented to be bound by the

provisions of section 322, which were extended over all such corporations as should continue in existence by Section 353. As the Legislature clearly had the power to repeal the charter of any corporation, it clearly had the right to compel the corporation to either surrender its charter or subject itself to the provisions of any particular statute, and certainly if the provisions of this Section 353 mean anything, they must mean that any corporation which continued its existence in Utah after 1898, or after 1907, became and thereafter was subject to the laws found in those revisions.

IV.

THE GENERAL RULE THAT CORPORATIONS MUST HAVE UNANIMOUS CONSENT OF ALL STOCKHOLDERS IN ORDER TO DISPOSE OF THEIR PROPERTY HAS NO APPLICATION IN UTAH.

Again, we submit that the general rule invoked by Appellants that a corporation must have the unanimous consent of all the stockholders in order to dispose of all its property, which rule is based upon the fact that such action would terminate the corporate existence and defeat its purposes prior to the time for which the corporation was organized, can have no recognition under statutory law, such as exists in Utah. Under the provisions of Chapter 72, Sections 3661, et seq., two-thirds of the stockholders of a corporation may arbitrarily at any time cause the dissolution of a corporation which, of course, is followed by the distribution of its assets

by sale, or otherwise, among its creditors and stockholders. This is exactly the same proceeding which has been taken, or was being taken taken, in the case of the Alice Company, with the exception of the order in which the proceedings were taken. With such statutory provisions in force, can it be reasonably urged that the purposes for which a Utah corporation is formed cannot be defeated without the assent of all of the stockholders?

V.

THE DISPOSITION OF ALL OF THE PROPERTY OF THE ALICE COMPANY WAS EXPRESSLY AUTHORIZED BY ITS CHARTER.

Another of the general rules providing under what circumstances a corporation may dispose of all of its property, laid down by Thompson, supra, is that in the event a provision is made for such sale or disposition in the charter or articles of incorporation. Under the authorities such provision was contained in the original charter of the Alice Company. In the original articles of incorporation of the Alice Company, as shown by the certified copy of those articles introduced in evidence, paragraph 3, and as plead in plaintiffs' amended bill of complaint, is the following:

> "The business and pursuit of the corporation shall be to buy, sell, lease, hold, own and operate mines, mining claims, mills, millsites, furnaces and reduction and refining works; to buy, sell and exchange mineral ores and bullion; to buy, lease, con-

tract and operate roads, tramways, and freight and transportation routes, to facilitate the business of the company; to appropriate, buy and sell water, water rights and ways for conducting the same, and generally to do all kinds of business incident to, connected with, or convenient for the management of a general mining business, in the Territories of Utah, Montana, Idaho, and in any State or Territory of the United States."

That provisions such as those above quoted from the Alice Company's charter, plainly gave the directors of the Alice Company or the directors and a majority of the stockholders of that company authority to convey all of its property as against the protest of minority stockholders, is well settled by authority. See:

Pitcher v. Lone Pine Consolidated Mining Co., 81 Pacific, 1047;
Lang v. Reservation Mining & Smelting Co., 93 Pacific, 208;
Traer v. Lucas Prospecting Co., 99 N. W., 290;
Maben v. Gulf Coal & Coke Co., 56 Southern, 607.

In each of the above cases minority stockholders were contending for the application of the general rule that a corporation cannot dispose of all of its property as against the dissent of any stockholder, but the right was sustained under charter provisions similar, or substantially similar, to those found in the Alice articles.

In the Pitcher case above cited, the court upheld the power of the trustees alone to sell all of the property

of the corporation under the articles of incorporation, a portion of the purposes being as follows:

> "The purposes for which this corporation is formed are to work, operate, buy, sell, lease, locate, acquire, procure, hold and deal in mines," etc.

In the Lang case, in the articles of incorporation it was stated that one of the objects for which the corporation was formed being to buy, sell.....and deal in mines.

In the Traer case above cited, the provision of the articles of incorporation, upon which the right to convey was upheld was as follows:

> "The business of this corporation shall be to acquire, purchase, lease, option, own, sell and mortgage coal lands, or supposed coal lands, mineral estates, in the state of Iowa or elsewhere; to buy and sell real estate; to prospect for coal and mine coal and other minerals or mineral products, and generally to buy, sell, handle and deal in and market coal of all kinds."

In the Maben case a portion of the syllabus, showing the substance of the decision, is as follows:

> "Where a private corporation was authorized, among other purposes, to rent or purchase mineral lands and to sell and lease the same, a majority of its stockholders had power to authorize a sale of all its lands and minerals which constituted all its property, over the protest of minority stockholders, who, in the absence of fraud, breach of duty, or bad faith, were not entitled to invalidate such sale, because the corporation was thereby denuded of all its property."

VI.

THE MAJORITY STOCKHOLDERS OF THE ALICE COMPANY HAD FULL POWER TO DISPOSE OF ALL ITS PROPERTY UNDER THE SIXTH GENERAL RULE GIVEN IN THOMPSON ON CORPORATIONS, SECTION 2429, SUPRA.

Under this rule it is not necessary, as assumed by the Appellants, that the corporation should be either insolvent or in imminent danger of insolvency, as that word is used in its technical sense, before the power of the majority of the stockholders to dispose of the property may be exercised. Under this rule this power may be exercised either, when the corporate business has become permanently unprofitable, or where it would be ruinous to the corporation and the stockholders to continue the business, or where there are insufficient funds to continue the business and no money with which to pay existing indebtedness, or where the corporation is in failing circumstances, as well as when it is in fact insolvent or in imminent danger of insolvency, in the technical sense of that term.

The condition of the Alice Company in these respects is clearly delineated in subdivision III and subdivision IV of our statement of this case, supra, and it would only tend to prolixity to now restate the same. The court's attention is invited to this statement. It clearly demonstrates the corporate business of the Alice Company had for many years been, and was then, per-

manently unprofitable; that it would have been ruinous to the corporation and the stockholders to have attempted to resume the business of mining operations upon the Alice property and bear the enormous expenses thereof without assurance of success; that there were insufficient funds to resume and carry on such mining operations, and that there was no possible way by which such funds could be raised or even obtained by mortgages upon the property; that there was no money with which to even pay the existing indebtedness of the Company; that so far as its business was concerned, and so far as it was concerned, the said Company was in failing circumstances, and utterly unable to carry out the purposes for which it was organized.

Under these circumstances, no principle of public policy, and no right of its individual stockholders, required that it should continue to exist upon the insistence of minority stockholders.

The Supreme Court of this state in the case of Forrester and MacGinniss against the Boston & Montana Consolidated Copper & Silver Mining Company, 21 Montana, page 544, early recognized this exception to the general rule. The facts in that case were that the Boston & Montana Company, a going prosperous Montana corporation, undertook to sell and convey all of its assets to a corporation of similar name, organized under the laws of the State of New York, receiving in consideration for its property and assets, the stock of the

New York corporation. The transaction was complained of by Forrester and MacGinniss, stockholders, and as a result of the litigation which followed, the sale was held invalid. The Court, in stating the basis for its decision, said:

> "At common law, neither the directors nor a majority of the stockholders have power to sell or otherwise transfer all the property of a going, prosperous corporation, able to achieve the objects of its creation, as against the dissent of a single stockholder." (Citing cases.)

And proceeding:

> "Our attention is called to certain decisions which are said to recognize a contrary doctrine; but examination discloses no conflict of opinion among the various courts of last resort. Treadwell v. Manufacturing Co., 7 Gray, 393, is typical of the cases relied upon by the defendants. A short extract from the opinion (page 405) will serve to illustrate the error into which counsel has fallen: 'Upon the facts found in the case before us, we see no reason to doubt that the vote of the majority of the stockholders, for the sale of the corporate property, and the closing of the business of the corporation, was justified by the condition of their affairs. Without available capital, and without the means of procuring it, the further prosecution of their business would be unprofitable, if not impracticable. Under these circumstances, it was in furtherance of the purposes of the corporation to pay their debts, close their affairs, and settle with their stockholders on terms most advantageous to them.' In that case, as in every one cited by the defendants, the corporation was unable to further prosecute the purposes for which it was created."

The Massachusetts case referred to in the decision, Treadwell v. Salisburg Mfg. Co., 7 Gray, 393, same case, 66 American Decisions, 490, is perhaps the leading case upon the subject in the United States,—at least, it is the case to which in our investigation, we have found most frequent reference made. In addition to the quotation made in the Montana case above referred to, the court says:

> "But we entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and close their business, if the exercise of a sound discretion they deem it expedient so to do. At common law, the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances, or quantity. To this general rule there are many exceptions, arising from the nature of particular corporations, the purposes for which they were created, and the duties and liabilities imposed on them by their charters. Corporations established for objects quasi public, such as railways, canal, and turnpike corporations, to which the right of eminent domain and other large privileges are granted in order to enable them to accommodate the public, may fall within the exception; as also charitable and religious bodies, in the administration of whose affairs the community, or some portion of it, has an interest to see that their corporate duties are properly discharged. Such corporations may, perhaps, be restrained from alienating their property, and compelled to appropriate it to specific uses, by mandamus, or other proper process. But it is not so with corporations of a private character, established for trading and manufacturing purposes. Neither the public nor

> the legislature have any direct interest in their business or its management. These are committed solely to the stockholders, who have a pecuniary stake in the proper conduct of their affairs. By accepting a charter, they do not undertake to carry on the business for which they are incorporated indefinitely, and without any regard to the condition of their corporate property. Public policy does not require them to go on at a loss. On the contrary, it would seem very clearly for the public welfare, as well as for the interest of the stockholders, that they should cease to transact business as soon as, in the exercise of a sound judgment, it is found that it cannot be prudently continued. If this be not so, we do not see that any limit could be put to the business of a trading corporation, short of the entire loss or destruction of the corporate property. The stockholders could be compelled to carry it on until it came to actual insolvency; such a doctrine is without any support in reason or authority."

In Hayden v. Official Hotel Red Book & Directory Co., 42 Federal, page 875, a similar doctrine is announced, where it is held that:

> "The right of the majority stockholders of a corporation established for manufacturing and trading purposes to wind up its affairs, and dispose of its assets, even against the objections of the minority stockholders, whenever it appears that the business can be no longer advantageously carried on, is well recognized."

In Manufacturers' Savings Bank v. O'Reilly, 10 S. W., 865, cited by the Supreme Court of Missouri, which case is somewhat analagous to the present case in that certain of the directors of the selling and purchasing

corporations were common directors to both corporations, the court held:

> "We held in Hutchinson v. Green, 91 Mo., 367, 1 S. W., Rep., 853, that, when a corporation became unable to meet its obligations in the usual course of business, the directors could make a voluntary assignment for the benefit of all of the creditors, and that they could do this without the consent of stockholders. So, too, it is the duty of the directors to pay the debts of the company; and they are justified in using the property for that purpose. They may use the property for such a purpose, though the company be thereby disabled from carrying on its business, if they act in good faith. I Mor. Priv. Cor. (2nd Ed.) Sec. 513.
>
> "Here the corporation was insolvent,—unable to go on with its business. As said by the referee, it had to go into liquidation of some sort. Had this sale been made to persons other than the directors themselves, its validity could not be questioned by the stockholders in any form of action.
>
> "Directors of a corporation have no right to use their official position for their own benefit, nor can they represent the corporation and themselves in the same transaction. They may be made to account to the corporation for all profits made by the use of the corporate property. (Citing cases.) But, according to what we held in Kitchen v. Railroad Co., 69 Mo., 224, the mere fact that these defendants were directors and stockholders in the selling and purchasing corporation would not make the sale absolutely void."

And accordingly, as the court found that the sale was an advantageous one, although made to the directors, the sale was sustained.

In Peabody v. Westerly Waterworks, 37 Atlantic, 807, it appeared that a sale of the entire property of a

corporation had been authorized by a majority of the stockholders of the concern. As in this case, a certain minority interposed an objection. The court says:

> "In so far as the bill relates to the rights of the complainant Peabody as a stockholder, it proceeds on the ground that a majority of the stockholders of the waterworks are disposing of its property at a price which he thinks inadequate. The action of the company has been taken by a vote of more than 1,100 out of a total of 1,350 shares. There is no proof of any unfairness, oppression, or fraud in such action. The case as presented is simply that of a stockholder who differs from a large majority of his fellow stockholders as to the expediency of a sale. No reason is shown for the intervention of the court."

The court accordingly denied a continuance of an ex parte injunction, and inasmuch as the parties had stipulated that the decision of the court upon the injunction hearing should have the same effect as upon the trial of the case, the case was ordered dismissed.

In Sewell v. East Cape May Beach Co., 25 Atlantic, 929, the Supreme Court of New Jersey held that the court would not interfere with the directors in disposing of the property as a whole where there was no fraud and no violation of the company's by-laws and the directors were sustained by a large majority of the stockholders of the concern.

To the same effect see also:

Traer v. Prospecting Co., 99 N. W., 290;
Price v. Holcomb, 56 N. W., 407, at 411;

2nd Ed. Thompson on Corporations, Secs. 2424 and 2429. Note.

Cummings v. Parker, 250 Mo., 427, 157 S. W., 629.

In Price v. Holcomb, above referred to, and in Traer v. Lucas Prospecting Co., 99 N. W., 290, the Supreme Court of Iowa lays down a doctrine peculiarly applicable to the present case, inasmuch as the character of the business in both cases somewhat resembles the character of the business formerly conducted by the Alice Company. In these cases it appeared that a sale of the entire assets had been made of the corporation in which the complainant was a stockholder, such corporation having been created for the purpose of carrying on a mining, prospecting and development business. They had acquired certain property which possessed more or less value, but had reached a point where they could no longer carry on the exploitation or development of the property, and accordingly the property was sold. In the last case cited the Court says:

> "It is true that the prosperity of the Lucas Company may depend upon the earning capacity of its fuel company stock, and that through this channel the plaintiff's stock in the Lucas Company may be affected. But the value of the plaintiff's stock has at all times depended upon the property and prosperity of the Lucas Company, and, unless it has been guilty of fraud which will affect the value of his stock, he must take his chances in its investment. There is nothing in the record in this case even tending to show that the transaction was not fair and honest, and for the best interests of the

Lucas corporation and its stockholders. Indeed, the record presents very nearly such a case as was before the court in Price v. Holcomb, 89 Iowa, 123, 56 N. W., 407. The prospecting company held properties, in the form of options, leases, etc., which it believed valuable, but was without means to fully prospect and develop. It made many efforts to interest capital in the venture, with the assent and co-operation of all the stockholders, including those then owning the stock now held by the plaintiff, and it was unable to accomplish anything until the Inland Coal Company took hold of it. Under very similar circumstances, it was held in the case last cited that the sale was warranted, and not a fraud upon the minority stockholders. And in this case it is shown that the value of the plaintiff's stock had been very materially increased by the transaction.

"We reach the conclusion that the sale and transfer were not beyond the charter powers of the corporation, and that it was fully authorized to sell the same for the stock of the other corporation. See also Miners Ditch Co. v. Zellerbach, 37 Cal., 543; 99 Am. Dec., 300."

The California case cited in the foregoing opinion contains a very extensive and learned discussion of the right of a corporation to sell under certain circumstances and conditions, all of the property of a corporation, and while it is true that in that case the question came up upon an inquiry into the title conveyed by the corporation, and to that extent is not a precedent, the case is nevertheless an exceedingly instructive one as to the circumstances which will justify a corporation in failing circumstances, unable to carry out the purposes of its existence, in making a sale and conveyance of all

of its property and assets, with particular application to a private corporation under no duty to the public.

In the recent case of Bowditch et al. v. Jackson Co., 82 Atlantic, 1014, certain stockholders of the defendant company attempted to enjoin a sale of the assets of the company to the Nashue Company, claiming that the corporation could not sell out all its assets or dissolve without the consent of all its stockholders unless it was in a failing condition. The court, however, held otherwise. The syllabus, which we think accurately states the case, is as follows:

> "The action of a majority of the stockholders of a corporation, whereby, as a part of the process of winding up and dissolving the corporation, they voted to sell all its property to another company at any adequate price, under an arrangement fair, equitable, and free from fraud, was within the power impliedly given them when the corporation was formed.

We quote from the opinion:

> "Much has been said in the cases upholding the right of the minority to prevent a sale and dissolution, concerning the protection of their rights and saving their property from pillage by the majority. Just how the majority, which sells its own property at the same time and for the same price it sells that of the minority, gains an advantage over the latter is not readily apparent. Cases might be supposed, and undoubtedly occur, where the majority do obtain some undue advantage from the sale. No one contends that such a sale is valid. But because the power of the majority may be abused, it does not follow that it does not exist. If such a conclusion were to be drawn, minorities

would always rule. The plain common sense of the matter is that this is a business venture, to be carried on as such so long as it appears to be good business judgment to do so. When the time comes that a majority in interest believe that their affairs should be wound up and the proceeds distributed, the rational rule is that this should be done. And since the question here is of a business nature, and the limitations of the power of the majority are fixed by the understanding of the business men who made the original compact, business considerations have more than ordinary weight in determining what the contract was.

"It is admitted on all sides that the majority may sell out if the corporation is insolvent. And when brought face to face with the question whether they must wait until the stockholders' investment is all lost before taking action, the conclusion has been that if insolvency is imminent action may be taken. And the same is true if it is imprudent to continue. 4 Thomp. Corp. Section 4489, and authorities cited. One reason only is given why the power exists in these cases: It is reasonable to suppose that such authority was contemplated, because this is what sound business judgment dictates should be done. The difference between these cases and the present one is of degree only, not of kind. The majority are not obliged to wait until all possibility that the corporation can go on longer has been negatived. Some of the cases have stated that such is the rule; but the result of this would be to compel the majority to continue a losing business until their investment was entirely wiped out. To avoid so absurd a result, it has been said they could close out when insolvency seemed to be approaching. And so various forms of expression have been used to indicate the time when the majority could take action. All these are fairly summed up in the statement that the majority may close out the affairs of the company when it can no longer make a reasonable

profit. It is believed no court would now hold that the rights of the minority were more extensive than this rule implies.

"If the majority may sell to prevent greater losses, why may they not also sell to make greater gains? Bearing in mind that this is purely a business proposition, with no public rights or duties involved, there seems to be no substantial difference between the two cases, as a matter of principle. In each case the sale is made because it is of advantage to the stockholders. Whether the profit to be made is a reasonable one must be a relative matter. Three per cent when others make 2 might be reasonable; but 3 per cent when a sale could be made which would yield the stockholder 10 could hardly be thought an investment a reasonable person would retain. The loss to the stockholder by a failure to sell out on a basis which would yield him 10 per cent instead of the 3 he is receiving is in fact much greater than it would be if a concern went on neither making nor losing when the investment would earn 4 per cent elsewhere. It does not seem reasonable that the majority should have power to make a sale in the latter case, and not in the former. In neither case would the sale prevent positive loss, but in each it would result in positive gain. And the question is one of future prospects. Its decision requires the exercise of business judgment, sagacity and power to forecast coming events. It is not an issue appropriate for trial and decision in courts, but rather one to be settled by the judgment of the men conducting the business in question. In a limited sense, the majority act as trustees for all the stockholders. When their acts are impugned by the minority, it is not the function of the court to set its judgment against theirs in settling the wisdom or policy of proposed action. By the contract of association, all questions of this nature were committed to the majority for final decision."

The contention of Appellants that the substance of the circular sent out by the management to the stockholders of the Company affects in the least the right of the stockholders of the Alice Company to dispose of its entire property if they elected so to do, granted by the common law by reason of its having ceased to be a going concern, is clearly unfounded. What, if any, influence this circular had upon the minds of the stockholders is not made to appear, and is, in our judgment, wholly immaterial. The right existing, the sale may not be voided, even though the reason of the stockholders in voting the ratification might be otherwise, but there is no justification for the conclusion that the stockholders did not have in mind their rights so reserved by the common law as well as the statutory rights undoubtedly given them by the laws of the State of Utah. If the contents of this circular were material upon this point, it is sufficient to say that the statements therein contained were abundantly sufficient to justify a sale of the property in pursuance of this power.

Neither are the reasons given by Mr. Kelley and Mr. Ryan, referred to on pages 48 and 49 of Appellants' brief, as to why the Anaconda Copper Mining Company desired to purchase the Alice properties, of any consequence whatever. They relate wholly to the purpose of the Anaconda Company in purchasing these properties, and not to the reasons why the Alice Company desired to sell the same to said Company.

VII.

THE FACT THAT THE ALICE COMPANY AND THE ANACONDA COMPANY HAD ONE COMMON DIRECTOR DID NOT AFFECT THE VALIDITY OF THE SALE, NEITHER DID IT THROW THE BURDEN UPON THE ANACONDA COMPANY TO SHOW THAT THE SALE WAS FAIR AND THE CONSIDERATION ADEQUATE.

The Court below ruled in effect that on account of unity of control between Anaconda and Alice, the burden was cast upon defendant, Anaconda Company, to show a fair sale and adequate consideration; and further ruled that this burden had not been discharged. This ruling was in line with the contentions of Appellants in this case, and is unjustified in our judgment by either the law or the testimony. In our statement, subdivision II, we treat of the relations between Anaconda and Alice; to this statement the attention of the court is particularly invited, and the same is incorporated under this sub-division by reference. Therefrom it clearly appears that the only relationship calling for attention is the fact that Mr. Ryan was a common director of both companies. It also appears, among other things, that the Butte Coalition Mining Company was incorporated for the purpose of acquiring, and shortly after did acquire, the capital stock of a corporation known as the Red Metals Mining Company, and also purchased and acquired a controlling interest, 234,215

shares out of 400,000 shares, of the Alice Company. The funds with which Coalition purchased Red Metals and Alice stock were obtained by general subscription to the stock of the Coalition Company. At the time of its incorpoartion this Company had more than two thousand stockholders, and at the time of its dissolution over three thousand stockholders. Thomas F. Cole, disassociated in any way from Anaconda or Amalgamated, was President, and the Board of Directors was, in the main, disinterested persons. No director of Alice was ever connected with either Anaconda or Amalgamated, save John D. Ryan. In affairs of the Alice Company, Mr. Ryan testified that he was guided largely by the advice of Carson and Thornton, mining men of long experience and familiar with the Butte properties, and directors of the Alice, and that was particularly true in relation to a determination of the reasonable price of Alice properties. Beneficial ownership of stock held by the directors of the Alice Company rested in Butte Coalition, but that did not connect such directors with the Amalgamated or Anaconda Companies; and there is positively no basis upon the record for Appellants charging that Coalition or Alice were in any way creatures of, or controlled by, Amalgamated or Anaconda or their officers. There are a large number of stockholders in Alice, not interested in Coalition, who have approved of the transaction with Anaconda. Butte Coalition Company and its stockholders are also interested in and approved the same; and to hold that the

transaction can be voided and the interests of the approving Alice stockholders and Coalition Company and its stockholders injuriously affected, would require most substantial proof of control of Alice by either Anaconda or Amalgamated. No such proof is found in the record. All that is shown upon the record is that the Alice and Anaconda Companies had one common director, Mr. Ryan. The rule announced by the learned Judge below, and maintained by the Appellants, cannot be sustained. The authorities cited by Appellants upon this point apply, in the main, to cases where the director was dealing with the corporation in his personal capacity, and was making a personal profit out of the transaction, or where a majority of each Board were common directors. We believe the general rule to be that a contract between a director of a corporation and his Company is not void, but is voidable at the option of the corporation if exercised within a reasonable time. Such is the rule laid down in Stewart v. Lehigh Valley Ry. Co., 38 N. J. Law, page 505, but no such stringent rule applies to contracts made between corporations having but one common director.

In the case of Smith v. Ferris, 51 Pacific 710, the Supreme Court of California had occasion to investigate the question extensively. The Court ably reviews the authorities and holds that in a case where the directors of the corporations buying and selling were the same:

> "If the contract was made in good faith; if it was profitable to the stockholders of the defendant corporation; if, as we have shown in this case, the

> defendant corporation received at least $150,000 worth of property for nothing—we hardly see how a dissatisfied stockholder, indulging in the wild presumption that such a one could be found, would be able to avoid it in a court of equity. It would not seem that one dissatisfied stockholder could avoid it, if one hundred others were satisfied with and actively approved it."

This question was expressly passed upon by the Supreme Court of California in the case of San Diego v. Pacific Beach Company, 112 California, page 53. In this case the respondent had five directors, and the appellant nine, and at the time the contract was made four of the directors of the appellant were also directors of the respondent, and it is also claimed that before the completion of the contract a fifth director of the appellant became a director of the respondent. A majority of the directors were also stockholders of both. The contention of the appellant is that because of a common directorate the contract was void and incapable of ratification, etc. The Court says:

> "Where two corporations, through their boards of directors, make a contract with each other, the directors who are common to both are not within the rigid rule of the cases which hold that one who acts in a fiduciary capacity cannot deal with himself in his individual capacity, and that any contract thus made will be declared void without any examination into its fairness, or the benefits derived from it to the *cestui que trust*. Two corporations have the right, within the scope of their chartered powers, to deal with each other; and this right is certainly not destroyed or paralyzed by the fact that some, or a majority, of the directors are common

> to both. Of course, if such directors should wrongfully and wilfully use their powers to the prejudice of one of the corporations, their action, if not acquiesced in, and contested at the proper time, could be avoided, as in any other case of actual fraud. But such common directors owe the same fidelity to both corporations, and there is no presumption that they will deal unfairly with either; therefore, their acts as such common directors are not void. There are abundance of authorities to this proposition, but it is hardly necessary to refer to any other than that of Pauly v. Pauly, 107 Cal., 8, 48 Am. St. Rep., 98, and the cases there cited."

In the case of the Evansville Public Hall Co. v. The Bank of Commerce, 144, Ind., page 34, the same rule is announced. It was held that the note made by one corporation in favor of another is not invalid merely because the two corporations have common directors, where it represents a debt justly due from the maker to the payee.

> See also Pauly v. Pauly, 107 Cal., 8; 48 Am. St. Rep., 98, and cases there cited.

In the latter case the distinction is again pointed out between the case where a director deals personally with a corporation, and the case where the common directors of two corporations participate in the dealings of the corporation, one with the other. The Court announced the rule which is well sustained, that it is not presumed that the parties dealt unfairly with each other. It is only when the director has interests conflicting with those of his principal that such presumption can arise.

VIII.

THE SUBSEQUENT RATIFICATION OF THE CONTRACT OF SALE BY THE STOCKHOLDERS OF THE ALICE COMPANY RENDERS THE QUESTION OF COMMON DIRECTORS IMMATERIAL.

It is insisted that the Court should not overlook in considering this proposition that the deed from the Alice Company to the Anaconda Company does not stand upon the act of the directors of either corporation. It is true that of seven directors of the Anaconda Company, one was a director of the Alice Company, and that of Coalition seven directors, but one was a director of the Alice Company, but if any question existed as to

to both. Of course, if such directors should wrongfully and wilfully use their powers to the prejudice of one of the corporations, their action, if not acquiesced in, and contested at the proper time, could be avoided, as in any other case of actual fraud. But such common directors owe the same fidelity to both corporations, and there is no presumption that they will deal unfairly with either; therefore, their acts as such common directors are not void. There are abundance of authorities to this proposition, but it is hardly necessary to refer to any other than that of Pauly v. Pauly, 107 Cal., 8, 48 Am. St. Rep., 98, and the cases there cited."

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A plain distinction for most obvious reasons is drawn between a situation where there is a common director, or there are common directors, but less than a majority, and where all or a majority of both boards are the same persons. See

U. S. Rolling Stock vs. Atlantic R. Co., 34 Ohio St. 450;
Leavenworth Co. vs. Chicago R. Co., 134 U. S. 688;
San Diego etc. R. Co. vs. Pacific Beach Co., 112 Cal. 53, 44 Pac. 333;
Evansville Public Hall Co. vs. Bank, 42 N. E. 1097;
Hiles vs. Hiles & Co., 120 Ill. App. 617;
Booth vs. Robinson, 55 Md. 419;
Thompson on Corp., sec. 1241.

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In Metropolitan Telephone Co. etc. v. The Domestic Telegraph etc. Co., 44 N. J. Equity, 568, the Chancellor held that where a contract was made between two corporations having common directors, and one

corporation would not have had a quorum without counting a common director who was largely interested in the proposed transaction, the transaction might not have been sustained but for the fact that subsequently, at a full meeting of the board of directors, where a quorum, without counting the common director, was present, and the transaction was ratified, no cause for complaint existed.

In conclusion upon this branch of the argument, we wish to call the attention of the court to the rule laid down by Cook on Corporations, Sixth Edition, Section 658, in which the learned author cites authorities so voluminous that it would merely encumber this brief to refer to them.

As stated above, the legal effect of the situation, if the two companies had had a complete common directorate, is unimportant, because the action of the directors was ratified and approved by and made the act of the stockholders. Under the law, if the directors were not disposed to act after the proceedings taken by the stockholders, their action could have been coerced.

At the stockholders meeting the transaction was approved by the holders of 289,590 shares, it having been approved by the holders of over 55,000 shares entirely independent of the Butte Coalition Company, at the meeting, and in fact out of the holders of the entire capital stock (400,000 shares) the only parties who have objected are the complainants in this action, owning about 13,000 shares.

IX.

THERE WAS NO BURDEN OF PROOF UPON DEFENDANTS, BUT IF SO THE SAME WAS FULLY DISCHARGED, AND THE EVIDENCE SHOWS THAT THE PRICE PAID FOR ALICE WAS FULL, FAIR AND ADEQUATE.

We have shown that the Alice Company was expressly authorized, both by the Statute of the State of Utah, and by its charter (and either was sufficient), to dispose of all its property by action of its board of directors, or at least by action of its board of directors ratified by the holders of a majority of the stock. And we have also shown that the evidence clearly showed common law authority upon the part of the board of directors of the Alice Company, and its stockholders, to dispose of all its property, on account of the financial and business condition of the corporation.

While we do not agree with the learned Court below that there is any burden upon the defendants and Appellees in this action, the corporation through its directors and approval of its stockholders clearly having power to sell, yet we assert that an impartial consideration of all the testimony shows clearly that such burden has been fully discharged.

It is contended by Appellants that it devolved upon Appellees to show (a) that the sale was a wise one and in the interest of the Alice Company; (b) that all information in possession of the officers of the purchaser af-

fecting the value of the property was given to the vendor or its officers; and (c) that the consideration was altogether adequate.

THE PRICE PAID FOR THE ALICE PROPERTIES WAS ITS FULL VALUE.

The consideration paid for Alice property is found by the court to have been $1,500,000 together with the assumption of certain liabilities of the Alice Company. This was a figure largely in excess of the then, or now, known value of the Alice property, and could only be justified on the basis of speculative value which the property might possess to the Anaconda Copper Mining Company, and value which could only be determined by a corporation strong enough to carry the burden of equipping, exploiting and developing the ground in the hope of encountering paying ore bodies, and strong enough to incur the speculative risk of the investment, and so favorably situated that it could carry on explorations at the least possible expense.

Subdivisions 3 and 4 of statement, supra, contain a critical analysis of the testimony touching value of the Alice property and the condition of the Alice Company. The same is incorporated herein by reference and the attention of the court invited thereto.

Therein it is clearly demonstrated that the court gave undue prominence in its conclusions as to the adequacy of consideration to the estimates of value by Weed and Corry, and it is further demonstrated that these estimates were wholly incompetent and ought not to have

been considered by the court in any respect; and when these estimates are disregarded, as they should be, the undisputed testimony in the case leads the mind of a candid investigator irresistibly to the conclusion that the consideration paid for Alice was full, fair and adequate.

From this analysis, and from the record itself, it appears that under conditions existing in 1910, and for many years prior thereto, and at the time of the trial of this suit, the Alice properties contained no known ores of any value whatsoever; that for many years the property had been practically abandoned; that base ores remain in the workings of the mine, altogether refractory, carrying silver and zinc, which, notwithstanding the great progress made in the art of metallurgy, remain still unworkable. Although Alice was controlled by wealthy interests, which had kept continuous possession of the property, and had assiduously investigated the question of the reduction of these ores, no profitable method of their reduction had been discovered, and very recent and extensive investigations had proven them wholly refractory to any known processes.

The most successful experimentations for the reduction of zinc ores in the Butte Camp had been carried on by Mr. Bruce, who, after five years and at great expense, adapted a process to the reduction of the zinc ores of the Butte & Superior and Elm Orlu, these ores being much less refractory than the Alice ores. The record shows that Bruce was unable to devise a method

to successfully treat the Alice ores, and that even the high samples introduced into the record by Mr. Walker, the same being altogether hearsay, and the high values referred to in the Buzzo letters, also being hearsay, Mr. Bruce stated at the time of the transaction in question such ores could not be profitably handled, and even at the time of the trial such ores had only a slight value.

The analysis of the testimony, heretofore referred to and the record, shows that the Alice property could only be developed at an enormous expense, and that even a 500-ton stamp mill to treat Alice ores would cost more than $500,000, and the expense for the development of these properties would be much greater to any other purchaser than to the Anaconda Company, its favorable situation in relation to the property being advantageous to it; that the value of the Alice ores was altogether speculative and dependent upon future indeterminate progress in the metallurgical art; that the discovery of copper ores in the Alice properties was only a remote possibility, and that the amount of development work necessary to demonstrate the presence of such ores could not even be approximately estimated; that notwithstanding ten miles of underground workings and fifteen hundred feet in depth, no copper of value had been discovered therein; that the Rainbow Lode is in distinctively silver-bearing distirct; that the only hope of finding any copper in the Alice would be in certain northwest and southeast veins which, under the testimony, may or may not penetrate Alice ground,

and that as these veins have been developed and worked in the direction of the Alice property they have become absolutely barren of copper ores; that the estimates of Weed and Corry are based upon hearsay and incompetent testimony and knowledge, and ought to have been discarded; that these estimates are altogether speculative and should not have been used as the basis for determining the question at issue, and that the court should, from the details of the evidence, have decided as to the reasonableness of the consideration for the Alice property.

Said analysis and the record further show that during the entire period of the Company's operations after 1898 the stock of the Company had practically no value; that a few years prior to purchase by Anaconda the controlling interests of Alice property optioned a majority of the stock of that Company at the rate of One Dollar and Fifty Cents per share, or Six Hundred Thousand Dollars for the entire property, and that such stock was thereafter acquired by the Butte Coalition Company at that rate; that following that purchase, and during the period from 1906 to 1910, there had been no particular development adding to its value and no change in its condition; and yet it is now contended that in the year 1910 the value of the stock of the Alice Company had increased to such extent that Three Dollars and Seventy-Five Cents per share was wholly inadequate.

Strongly persuasive, if not conclusive, upon this ques-

tion of value is the proceedings in reference to the Alice property in pursuance of the interlocutory decree. It is a matter of common knowledge of which notice will be taken that the mining situation in the United States was never better than at the time when the Alice property was offered for sale at public auction in the city of Butte in pursuance of the interlocutory decree of the court below. The price of copper had advanced far beyond what it was in 1910, and the products of zinc ores were commanding a price theretofore wholly unknown in the history of the mining industry. The utmost publicity in financial circles of the United States was given to the sale. Notwithstanding this, no purchaser could be found who would bid for the property a price in excess of that paid by the Anaconda Company in the year 1910.

The learned judge below, before entering final decree, should have considered this transaction as evidence touching the adequacy of the consideration paid for Alice, and this court not only may, but should, consider the same in determining whether or not the consideration for Alice was in all respects adequate.

Blythe v. Hinckley, 84 Federal, 234.
Celluloid Mfg. Co. v. Cellonite Mfg. Co., 40 Federal, 476;
Northwest Trans. Co. v. Boston Marine Ins. Co., 41 Fed. 796;
Street, Federal Equity Practice, Vol. 2, Sec. 1918.
N. K. Fairbank Co. v. Windsor, 124 Federal, 202.
Roemer v. Neumann, 26 Federal, 333.
Deitch v. Staub, 115 Federal, 317.

X.

THE SALE OF THE ALICE PROPERTY WAS WISE AND ADVANTAGEOUS TO THE ALICE COMPANY.

Appellants inquire why the Alice property should have been sold at the time it was sold. This question is answered by a moment's attention to the story of the Alice Company and the condition of its property and its financial situation. What reason was there that Alice should not sell? It obtained an opportunity to sell the Alice property for a fair price, something it had never had a chance to do during the entire history of its existence, during seventeen years of unprofitableness and idleness, and an opportunity which, if not accepted, would probably not occur again for another seventeen years or more. Measured by the selling price, more than a million and a half dollars belonging to the Alice Company had been, for over seventeen years, tied up in this unprofitable investment, yielding not a cent of revenue to its owners. It promised to remain so for an indefinite period. During that seventeen years no purchaser had been found for the property, and no syndicate or corporation who would take a lease and bond upon the same. Its ultimate value depended upon the intellectual processes of some metallurgist yet unknown, and upon the remote probability that such metallurgist, sometime in the indefinite future, might outstrip the present known knowledge of his art and develop a process making such ores valuable.

Development of the property would require, according to Weed and Corry, an expenditure of Two Million Dollars or better. Alice had no value upon which to base the borrowing of this money. The stock was not assessable, and the gentlemen who complain so bitterly now in reference to this trade with the Anaconda Company did not seem inclined to trust Alice for sufficient funds to carry out this development; and well they might be wary of such an adventure, for it might very reasonably be predicted that not only would the money be lost but Alice would also be stripped of all speculative value.

By the sale, Alice acquired property of the value of a million and a half dollars; property which, if converted into cash, which might readily have been done, and properly invested, would bring to Alice stockholders, either collectively or individually, a greater return each year than had ever been received, save and except during one year pending the existence of the Alice Company. Will Appellants please tell us why Alice should not have sold its property?

The wisdom of the sale is not only demonstrated by what is herein stated, and what has been disclosed in this brief and the record, in reference to the value and condition of the Alice property and of the Alice Company, but subsequent events after the year 1910 add confirmation to the wisdom of this transaction. Five years after this trade was accomplished, Alice still re-

mains unproductive and in the same condition as before, and five years thereafter, at public auction, duly and properly advertised, during a period of prosperity unexcelled so far as the mining industry is concerned, no bidder could be found who would offer in excess of a million and a half dollars for all the property of the Alice Company.

Appellants also inquire why the property was not leased and bonded. It does not appear that any opportunity was ever presented to lease and bond the property advantageously, or that any syndicate or association could be found willing to expend the necessary sums of money to develop the Alice property upon the chance of making it profitable; and it is certainly clear that it would have been inadvisable to take the gamble of a lease and bond upon the property when full, fair and adequate consideration was offered in property which was equivalent to cash. To this query we might reply—why did not the complainants in this case, during the seventeen years of idleness of the Alice property, lease and bond this property to some syndicate or association able and willing to undertake the enterprise?

The answer is evident in both instances. It simply could not be done upon a basis advantageous to the Alice Company.

Certainly the Alice Company and its stockholders were most fortunate in being able to dispose of such a property in 1910 for thirty thousand shares of the capi-

tal stock of the Anaconda Company, having a market value of one and one-half million dollars, paying regular dividends of Three Dollars per share per year, and having property, in addition to that of the Alice, with a speculative value almost unmeasurable; and certainly the stockholders of that Company displayed consummate wisdom in accepting the opportunity to convert a dead investment into a profitable and income-bearing one. If this sale had not been made the evidence shows the stockholders of the Alice Company would have, during a period of less than four years, the time between the date of the sale and the trial of this suit, been deprived of Three Hundred Thousand Dollars in dividends paid by the Anaconda Company.

But Appellants say that Weed and Corry have testified that it was not an opportune time to sell the Alice property, that the officers should have waited. Should have waited for how long? The stockholders had been waiting since the year 1898, anxiously expectant, hoping that something could be done with the property. Experiments upon the ores of other properties could not afford relief to the Alice, for the results of these experiments threw no light upon the problem of the Alice ores because of their difference in character. If the management of the Alice Company had not accepted the opportunity offered it by the proposition of the Anaconda Company in 1910, its officers and all others par-

ticipating in such refusal would have been subject to most severe condemnation by the stockholders.

In determining the question of reasonable value of the Alice property, the question as to whether the transaction was an advantageous one to the Alice Company and its stockholders, and in determining the ultimate question as to whether the transaction ought to have been by the court conditionally set aside, we submit that the court should carefully consider the fact that the transaction is opposed by the holders of less than four per cent of the capital stock of the Alice Company, and that it has been approved and decided to be to their best interests by the recorded approval of the holders of more than seventy-two per cent of the stock, and is presumably approved and desired by the holders of more than ninety-six per cent of the stock, and in this connection, as laid down by the court in the Bowditch case, 82 Atlantic, 1014, supra, this court should bear in mind that to set aside this transaction is to say that at the instance of the holders of less than one-twenty-fifth of the stock, the holders of the other twenty-four twenty-fifths shall not be permitted to exchange their Alice stock, of doubtful value and non-earning power, for their proportion of the Anaconda stock, having large present value, at least fair earning power, and speculative value difficult to estimate. But while this feature of the case may not be controlling, certainly in determining the question of reasonable consideration and of

whether the transaction was an advantageous one to the Alice Company, the judgment of the men holding its stock must be of great assistance, and the judgment of Mr. Ryan, of whom the court in its opinion said:

> "* * * there is nothing to inspire belief that they aimed at aught but fair bargarining, or that they designed injury to Alice and consciously abused their trust,"

must be most persuasive.

At the stockholders' meeting, outside of the stock in which the Coalition Company was interested, the record shows that 122 individual holders directly approved of the transaction. Each of these stockholders presumably knew more or less of the Alice property and its condition, and had opinions as to the value of their stock. Thus, we have the decisions upon this question of value and advantage of more than 122 individual stockholders who openly recorded their approval, in addition to the many holders of the remaining twenty-four per cent of the stock who have indicated their approval by assenting to and not objecting to the transaction, and certainly the judgment of all of these individuals upon a matter in which they were directly interested must be of great effect upon any decision as to the questions before this court. In addition, of course we must presume from the record the approval of the transaction by the 3500 individual stockholders in the Coalition Company, who, in proportion to their stockholdings, were interested in the assets of the Alice Company.

XI.

NO OFFICER OF THE ALICE COMPANY CONCEALED ANY MATERIAL FACTS FROM THE ALICE STOCKHOLDERS.

The question as to whether Mr. Ryan, or any other officers of the Alice Company, or even of the Anaconda Company, although certainly the Anaconda Company or any of its officers, as such, owed no duty of enlightening the Alice Company or its stockholders, did or did not lay before the Alice Company all of the facts within their knowledge as to the Alice or other ground in the Butte District, is clearly immaterial, as there is no stockholder before the court complaining that he gave his consent to the sale to the Anaconda Company because of any misstatement concerning, or lack of knowledge of, any material fact. None of the complainants voted in favor of the transaction, and none of the other stockholders, who together owned more than 96 per cent of the stock of the company, are complaining of the transaction, but it is idle upon this record to talk about there having been a concealment by anyone of any material fact. So far as the Alice Company was concerned, the condition of its properties, their developments, were matters of general public knowledge, and were shown by the records kept in the company's office. No development of any importance had been made since the ceasing of operations in the early '90's. The records of such sampling of the ore

as had been done since the taking over of its stock interest by the Coalition Company, were matters of record in the office of the company at Butte, and open to any stockholder, but results of this sampling were not at all encouraging. As to any facts known by any of the officers or representatives of the Anaconda Company, and the workings carried on in the adjoining mines, the evidence clearly shows that these developments, so far as they had any bearing on the value of the Alice properties, were unfavorable; and it is clearly illustrated by the evidence of Mr. Corry and Mr. Weed, that the facts of general and common knowledge in the Butte District concerning the operations of the Anaconda Company and other companies in the northwestern part of the Butte Camp would tend to give any Alice stockholder or other person a much more favorable opinion than the developments and conditions themselves would justify.

The only concealment of facts shown by this evidence was on the part of Mr. J. R. Walker, one of the complaints, who testified to the apparently favorable gross value of ores which he had had shipped by Mr. Buzzo and treated in Utah, and upon which he based his idea of the value of the property, placing it at in excess of ten million dollars. He stated that he had placed the returns and written data concerning these ores and their values in the pigeon holes in an office in Salt Lake, and had never communicated these facts to Mr. Ryan or any other officer of the company.

All of the Alice stockholders had knowledge or full means of knowledge of all the facts regarding the Alice Company and its property at the time of the transaction with the Anaconda Company. The condition of the property and its value was in no wise belittled or unfairly pictured to them in the circular letter sent them by the officers of the company, preliminary to the stockholders' meeting held in May, 1910.

XII.

UNDER THE CIRCUMSTANCES OF THIS CASE THE CONVEYANCE IN QUESTION IS NOT AFFECTED BY THE FACT THAT THE CONSIDERATION PAID THEREFOR WAS CAPITAL STOCK OF THE ANACONDA COMPANY.

A great portion of Appellants' brief is devoted to a discussion of the question as to whether or not Alice had authority to accept stock of the Anaconda Company in payment for its physical properties, and in order to justify a discussion of this question it is assumed, contrary to the record and contrary to any evidence in this case, that Alice either accepted this stock with the intention of holding the same permanently as an investment, or that it accepted the same with the intention subsequently, upon the dissolution of the Company, to compel each individual stockholder to exchange his Alice stock for stock of the Anaconda Company.

Neither of these assumptions finds any substantial

basis in the record, but on the contrary it clearly appears that it was the intention of the officers of the Alice Company to accept this stock in payment for the Alice properties as a step in the liquidation of the affairs of the Alice Company; and it further appears that before the complainants brought this suit, proper and legal steps had been taken by the Alice Company, through its directors and stockholders, authorizing the dissolution of that Company and the distribution of its assets to the various stockholders.

There is nothing disclosed in any of these proceedings that tends to indicate that it was the purpose of the Alice Company to compel the stockholders of the Company to take Anaconda stock in kind, and the presumption undoubtedly is that the dissolution of the Company so authorized would be carried out according to the laws of the State of Utah; and if such laws required either the sale of the entire stock of the Anaconda Company, held by the Alice Company, or the distribution in kind to those stockholders who were willing to accept the same, and the sale of the remaining stock and the distribution of the proceeds thereof to those stockholders preferring the proceeds of the sale of the stock to the stock itself, that necessary proceedings therefor would have been completed by the Alice Company had not the complainants in this cause interposed an objection and instituted legal proceedings to prevent the Alice Company from doing the very thing which they now say the Alice Company should have done.

Complainants say that there is no express power delegated to a corporation by the laws of the State of Utah to own or possess the stock of any corporation; therefore this transaction is ultra vires and should be set aside as being against public policy.

It is true that there was no statute that authorized expressly a corporation to acquire the stock of another corporation. The public policy of any state need not be indicated by an express statute giving the right, but may be shown by implication from legislative acts. The Statute of Utah, Section 344, of the Compiled Laws of Utah of 1907, allowing the consolidation of corporations, is, however, strongly persuasive as indicating the public policy of Utah in that respect; and as was decided in the case of MacGinniss v. Boston and Montana Company, where, under a statute of the State of Montana similar corporations organized under the state laws are permitted to consolidate, it is indicative of the fact that there is no public policy contrary to permitting a foreign corporation to exercise this power.

In speaking of the persuasive effect of the statute in Montana, the court says (29 Montana, 428, at page 458):

> "It is therefore not against the public policy of the state for one corporation to hold and vote stock in another of like character. The provisions of the statutes supra are to be construed as amendments to the general laws authorizing the formation of corporations and defining their powers, within the

purview of Section II of Article 15 of the Constitution, supra. The public policy of the state varies from time to time. It is not to be measured by the private convictions or notions of the persons who happen to be exercising functions, but by reference to the enactments of the law-making power, and in the absence of them, to the decisions of the courts. When, however, the legislature has spoken upon a particular subject and within the limits of its constitutional powers, its utterance is the public policy of the state.

"The Constitution does not prohibit consolidation. Its prohibition extends only to any device by which an attempt is made to deprive the state courts of jurisdiction. Section 527 of the Civil Code expressly authorizes consolidations of domestic corporations. House Bill 132, supra, impliedly authorizes them between domestic and foreign corporations, or, at least, goes to the extent of empowering one domestic corporation to hold stock in another of a similar character."

The court, therefore, upon that and other grounds, determined that it was not against the public policy of the state to permit the stock of one corporation to be owned by another of similar character.

So, too, it might be urged that the Constitution of the State of Utah does not prohibit the consolidation of corporations or the holding of stock by one corporation in another corporation. Its prohibitions in this respect are limited to prohibiting railroad corporations from consolidating the stock, property or franchises with any other corporation.

See:

Section 13, Article 12, Constitution of the State of Utah.

It is not necessary in this case, however, to contend, neither is it necessary to sustain the position of the defendants to contend, that authority exists in the Alice to acquire, own, possess and hold indefinitely, and as a permanent investment, the stock of any other corporation. One of the principles upon which this transaction is justified is that notwithstanding the most stringent limitations against a corporation exercising the power of holding stock in another corporation, still such a corporation is permitted by law to acquire and hold the stock of another corporation when such requirement and holding of stock is not intended to be of a permanent nature, but is temporary in character, and is done for the purpose of turning unprofitable assets of a corporation into liquid assets, and as a step leading towards the dissolution of the Company, and when it is the intention of the corporation either to distribute the stock or the cash obtained from a sale thereof upon dissolution proceedings regularly carried out, or where it is intended to sell or otherwise dispose of such stock.

The rule is very well settled in Thompson on Corporations, Edition of 1899, Section 8356, where it is said:

> "A transfer by a corporation of its entire assets and property of every description to another corporation, in exchange for the shares of the latter, made not with the intention of winding up its affairs and dividing its stock among its own stockholders, nor as a temporary arrangement, but as a permanent investment, is ultra vires, and may be set aside at the suit of a dissenting stockholder."

Such a transaction is perfectly legal, and under the circumstances shown in this case a corporation may take stock in another corporation, although not authorized by its articles of incorporation so to do.

Section 4064 of Thompson on Corporations, lays down the rule as follows:

> "There are still other exceptions to the general rule prohibiting a corporation from taking stock in another corporation. It has long been recognized to be within the power of a corporation to sell its products to another corporation, and, under some circumstances, to sell all of its property to another corporation, and take the stock of the latter in payment or in part payment of the property so sold. This power has been recognized especially in cases where corporations were heavily indebted and such a transaction was the only apparent means of liquidating the indebtedness. Thus in a Rhode Island case, directors of a corporation were held to be justified in disposing of an unsalable factory on which existed a heavy indebtedness, and taking in part payment therefor the stock of another corporation. These principles are supported by other decisions. The delivery of the certificates of stock under a contract of sale of property to be paid in stock, was held to operate as a discharge for the price."

See also:

Thompson on Corporations, Secs. 4063, 4065 and 4066.

The rule is thus stated in Clark & Marshall on Corporations, page 531, as follows:

> "It has been held that a manufacturing corporation cannot sell goods to a railroad or other corporation, and take payment therefor in stock of the latter; and this proposition is no doubt sound law when the intention is to hold the stock as an investment or for the purpose of controlling the other corporation. There is no reason, however, why a corporation which has the power to dispose of property should not be allowed, in the absence of express prohibition, to sell it for stock in another corporation, provided the transaction is for the bona fide purpose of advantageously disposing of the property, and the stock is taken with a view of selling it and converting it into money."

In Holmes and Griggs Mfg. Co. v. Holmes and Wessell Metal Co., 127 N. Y., 252; 24 American State Reports, 448, the doctrine herein contended for is distinctly affirmed, as follows:

> "It is doubtless true that a corporation cannot purchase or deal in stocks of other corporations, unless expressly authorized by law so to do. (Citing cases.) It is equally true, however, that it may do whatever may be necessary in the exercise of its corporate franchises. The selling of property and collection of debts is among the powers given, and hence it may take title to all kinds of property, even the stock of another company, in the payment of a debt. The statute under which the plaintiff was incorporated provided that 'it shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation.' Laws 1848, c. 40, Sec. 8. The funds here spoken of evidently mean the money of the company, and the statute was not intended to limit the powers of the corporation beyond that already indicated."

In Hodges v. New England Screw Co., 53 American Decisions, page 624, a case was presented somewhat similar to the present one, where a corporation in failing circumstances undertook to convey all of its property, and receive in payment the stock of another corporation. The Court says:

> "There are large classes of corporations in Rhode Island and the other states, which may and do rightfully invest their capital in the stock of other corporations; such, for instance, as religious and charitable corporations; and corporations for literary and scientific purposes. So insurance companies may rightfully invest their capital in the stock of other corporations, such as banks and railroads, and the like. Nor have we any doubt that the screw company might hive rightfully taken this stock in the iron company, in payment for their rolling-mill, if it had been taken with a view to sell again and not permanently to hold it."

This principle was expressly recognized in the case of McCutcheon v. Merz Capsule Co., as decided by the Circuit Court of Appeals in the Sixth Circuit, Justices Taft and Hammond concurring with Justice Lurton, 71 Federal Rep., 787, although the Court held that the facts did not, in the particular case, bring the corporation within the exception to the general rule. Said the Court:

> "The general rule is that, without express authority, a corporation cannot invest its funds in the stock of another corporation. (Citing authorities.) To this rule there are certain exceptions, due in part to strong implication from the powers

> expressly granted, or to the objects and purposes for which stock has been acquired. This under the rule that the implied powers of a corporation are only such as are necessary to the exercise of its corporate franchises, it has been held that where a debt was collected in the stock of another company, it was a valid transaction, under the implied authority to collect its debts in the most efficient way. (Citing cases.) So, in Treadwell v. Manufacturing Co., 7 Gray, 393, 405, it was held that, for the purpose of retiring from business, it was competent for a manufacturing corporation to sell the whole property of the corporation, taking payment in the shares of a new corporation, to be distributed among the stockholders of the old company. * * * That the facts of this case do not bring it within any well-recognized exception to the general rule inhibiting such investments is to us a most obvious proposition."

In Byrne v. Schuyler Electric Mfg. Co., 65 Conn., page 348, the doctrine is also recognized, where the Court says:

> "Nor do the cases cited deny that a corporation, under some circumstances, might expend its whole capital in the purchase of the stock of another corporation; as if such purchase was made for the purpose of selling the stock, and not permanently to hold it. That is what was said to be lawful in Hodges v. New England Screw Co., I R. I., 347. So, too, if such a purchase was made by a corporation in embarrassed circumstances, as the most advantageous way of closing its affairs, paying its debts and settling with its stockholders, it would be legitimate. This was what was done, and decided to be proper, in the Treadwell case."

In conclusion, after a review of the authorities, the Court says:

> "It may be stated as a general rule we think, subject possibly to some exceptions, that a corporation may not become a stockholder in another corporation for the purpose of holding the stock permanently, unless expressly authorized to do so. A solvent corporation may buy and sell the stock of another corporation, if done in the usual course of business, and may become the owner of such stock if taken in payment for debts; but an insolvent corporation may take the stock of another corporation only for the purpose of closing up its business, to be divided in kind, or to be converted into money and divided among its creditors and shareholders."

See also:

> Metcalf v. American School etc. Co., 122 Fed. 115;
>
> Treadwell v. Salisbury Mfg. Co., 7 Gray, 393.

That a national bank may take the stock of any corporation not for the purpose of dealing in stocks, but when it is necessary to hold the same temporarily, as for the satisfaction of a debt, see 92 U. S., page 122.

In this case, as shown by the evidence, not only was it the intention of the directors of the Alice Company, if authorized by the stockholders, to bring about the dissolution of the company and the distribution of its assets, but there has been introduced by the complainants a copy of the minutes of a meeting held by the stockholders at which proceedings were regularly taken as caused the submission of the proposition to the stockholders to dissolve the company, and such proposition

was carried by a vote of practically three-fourths of the stockholders of the corporation. Under the laws of Utah such dissolution may be authorized by a vote of two-thirds of the stockholders. Such is now the law and such was the law at the time of the creation of the Alice Company. It is alleged in the bill and disclosed by the evidence, that thereafter, in accordance with the Utah statutes, such proceedings were instituted in the District Court of Salt Lake County, Utah, as would have resulted in a decree of dissolution having been entered had it not been for the litigation instituted by the complainants in this action. These facts are sufficient in themselves to demonstrate that it was the intention of the officers of the Alice Company to dissolve it and not to convert it, as suggested by complainants' counsel, into a mere stockholding corporation.

Mr. Kelley testified that before the institution of the corporate proceedings which resulted in the transfer to the Anaconda Company, it was determined by the directors of the company, if the transaction with the Anaconda Company should be authorized by the stockholders, to thereafter proceed to dissolve the corporation and to liquidate its assets and divide them among the stockholders. It is expressly shown by Mr. Kelley's testimony that it was not the intention to force any of the Anaconda stock upon any stockholder who did not desire to take the same, but in such case the stock would be sold and the proceeds turned over to such objecting stockholder. The strongest corroborating evidence that

could be offered as showing that Mr. Kelley truly stated the purpose of the officers of the company is shown by the fact that long before the commencement of this action, and after the property had been conveyed to the Anaconda Company, so that the Alice Company was in a condition to be dissolved and its assets distributed, the necessary stockholders meeting was held and statutory proceedings instituted to accomplish such dissolution in compliance with the laws of Utah.

But counsel argue that because of the fact that the circular letter to the stockholders accompanying the notice of the stockholders meeting of May 27, 1910, at which the sale was authorized, did not also lay before the stockholders for consideration at that meeting the question of dissolution and did not state the plan of the directors as to the dissolution of the company, that such failure is strongly persuasive of their contention that no dissolution was intended. Until the stockholders at their meeting should consider and ratify the transaction with the Anaconda Company, and until the property had been conveyed and the assets of the Alice Company were in condition to be distributed or liquidated, the meeting authorizing the dissolution could not properly be called or held, and certainly such proceedings would have been somewhat premature until, at a stockholders meeting, the holders of two-thirds of the capital stock, the amount required by the Utah laws, had indicated their desire to consummate the transaction with

the Anaconda Company, and put the Alice Company in condition to be dissolved.

Counsel further argue that because this circular spoke in encouraging terms of the value of the Anaconda stock, which would be received in exchange, is an indication that it was the intention to have this stock held by the Alice Company as a permanent investment.

Whether an Alice stockholder upon subsequent dissolution should elect to take his proportion of the Anaconda stock, or should insist upon having it sold upon the market so that he might receive the proceeds, it certainly was of interest to him that the stock was of large value, and it is rather a forced inference from this language to say that it indicated an intention to permanently keep this stock in the Alice treasury. What purpose would there possibly have been in the minds of the Alice directors in planning to subject the Alice stockholders to the expense and trouble of keeping such corporation alive merely to hold the Anaconda stock, when each stockholder could as well control his proportion or receive the proceeds of it if he desired. Again, as shown by Mr. Kelley's testimony, the keeping alive of the Alice Company would have also prevented the dissolution of the Butte Coalition Company, and would counsel ask the court to believe that the Alice directors, who he claimed were controlled by the Butte Coalition Company, had settled upon this useless proposition of keeping the Anaconda stock in the Alice treasury, and thus entail the expense and trouble of keeping in existence these two large corporations.

Counsel further criticise the evidence of Mr. Kelley regarding the intention of the Alice officers by stating that his conferences were merely with the directors as individuals, and that no official action was shown to have been taken towards declaring the intention of the directors to dissolve the Alice Company prior to the stockohlders meeting authorizing the same. As shown above, the matter was not in condition for action by the Alice board of directors until after the Anaconda transaction had been ratified by the stockholders, and when it came time to act, the board met and caused the proper proceedings to be instituted for the dissolution of the company.

Under the facts in this case it is immaterial whether any technical corporate action was taken by the directors of the Alice Company declaring intention to dissolve the Alice Company. Such intention is clearly disclosed, and before the suit of the complainants, proper corporate action upon the part of the stockholders and directors had been taken to effectuate this purpose. This purpose would have been effectuated, the corporation legally dissolved and its assets legally distributed to its stockholders had it not been that these complainants instituted legal proceedings preventing the Alice Company from carrying out and accomplishing the very things which they now assert should have been carried out and accomplished by the Alice Company in order to render the acquisition of the stock of the Anaconda Company by it a legal transaction. Therefore, the pur-

pose of this suit is not to prevent the Alice Company from doing an *ultra vires* act, by holding permanently the stock of the Anaconda Company as an investment, but to prevent it from doing the very things which these complainants say it should have done. Under these circumstances it is wholly immaterial whether the directors of the Alice Company, prior to the sale of the property, passed a formal resolution declaring it to be the intention of the Alice Company to distribute its assets among its stockholders and dissolve the corporation; and the complainants may not rescind the sale of Alice to Anaconda upon the ground that the Alice Company has not done the things which it ought to have done, when in fact the Alice Company would have done those things and had taken proper legal steps to have those things done, had it not been for the intervention of complainants themselves

XIII.

THE CONTRACT OF SALE HAVING BEEN FULLY EXECUTED, THE CONTENTION THAT ALICE COMPANY HAD NO POWER TO TRANSFER FOR CAPITAL STOCK CANNOT NOW BE URGED BY A STOCKHOLDER OF ALICE IN BEHALF OF THAT CORPORATION.

If it be conceded, as it must be, that the Alice Company had power to sell its property to the Anaconda Company, and that under certain conditions it had a right to accept the capital stock of the Anaconda Com-

pany in payment therefor, the contract, after the same has been fully executed, the consideration paid and the property transferred, cannot be rescinded upon the suggestion of a dissenting stockholder of the Alice Company. If it was the purpose at the time of the making of the contract of sale to dissolve the Alice Company, upon the transaction being completed, to liquidate its assets and divide them amongst the stockholders, the Alice Company had a right to transfer for the capital stock of another corporation; and the subsequent conduct of the Alice Company cannot deprive the Anaconda Company of the benefit of the transaction. This being true, it is equally plain that the Anaconda Company, as purchaser, after the completion of the transaction, had no power to control the Alice Company in its disposition of the proceeds of the sale, and was not concerned with the disposition to be made of the stock by that Company. It is very true that the Anaconda Company was bound to take notice of the charter and statutory powers of the Alice Company; it is equally true that it was not bound to inquire further. Under the statute and the charter, and under the financial condition of the Alice Company, it having power to transfer its property, and under the law having power, under certain circumstances, to transfer it for stock the Anaconda Company was not bound to inquire what were the plans of the Alice Company or its officers with reference to the disposition of that stock, and is not to be held culpable because the Alice Company might

fail to dispose of said stock in a proper and legal manner. On the contrary, there being a legal method by which the Alice Company could dispose of the stock,—that is, by dissolution and liquidation, the presumption was that it would follow that lawful path. It certainly was not *ultra vires* for the Alice Company, under certain conditions, to sell its property for stock. There being a plain legal course which the Alice Company could have followed by selling its property and taking in exchange for the same the capital stock of the Anaconda Company, the transaction thus far was clearly *intra vires,* and certainly because the Alice Company did not follow, or did not intend to follow the law in its subsequent conduct, the sale cannot, for that reason, be now rescinded. Much less can it be rescinded upon the suit of dissenting stockholders of the Alice Company who, by their conduct, have prevented the Alice Company from making legal and proper disposition of the stock received by it and of its assets. It certainly would be a very strange rule of law, and one unrecognized by the authorities, to permit a dissenting stockholder of the Alice to prevent, by legal proceedings, the constituted authorities and stockholders of that Company from converting the Anaconda stock into cash, dissolving the Company and distributing the proceeds thereof to the stockholders, and then, after having so prevented the Alice Company from taking legal corporate action in this regard, impute the wrong of the Alice Company to the Anaconda Company and rescind an executed con-

tract and a sale of property on that account. The contract having been fully executed, the stock transferred to and received by the Alice Company, neither party, nor anyone on behalf of either, can disturb the statu quo.

The rule even upon strictly ultra vires contracts, where the contract has been fully performed, by payment and a conveyance and transfer, is stated in Clark & Marshall on Private Corporations, page 554, as follows:

> "CONVEYANCE OR TRANSFER TO CORPORATION.—If a corporation enters into an ultra vires contract to purchase property, real or personal, and the contract is fully performed by payment and a conveyance or transfer of the title, the effect of the transaction is to vest the title in the corporation, at least as against all persons but the state, and the corporation may afterwards sell the same. The other party cannot, in such a case, maintain a suit to rescind the sale and recover the property. Where a corporation purchases a note, and the note is transferred to it, the title passes, and it may maintain an action thereon against the maker and endorsers.
>
> "CONVEYANCE OR TRANSFER BY CORPORATION.—The same is true of a contract by a corporation to sell property, real or personal, which is fully executed. The title to the property passes by the conveyance or transfer, and the corporation cannot maintain a suit to rescind and to recover the property."

Also see cases cited under this section.

In the case of Holmes and Griggs Company against Metal Company, decision by the New York Court of Appeals, found in 24 American State Reports page 452, the court said in part:

> "The plaintiff has sold its rolling-mill, machinery, etc., to the defendant. It has taken stock in the latter company in payment therefor. Inasmuch as this was done with the consent of all of the stockholders, it being the act of a private corporation, not in any manner harming the public, we see no reason for condemning its title to the stock so obtained; Palmer v. Cypress Hill Cemetery, 122 N. Y., 429-435.
>
> "But assuming the transaction to have been ultra vires, the defenses interposed would still be unavailable. The plaintiff has the stock and has paid for it. It can not be recovered back by the defendant, for the transaction is completed and closed. Whilst the contract remained executory, if it was unauthorized, a stockholder or person interested might have interfered by injunction, and prevented the transfer of the property of the plaintiff to the defendant. But the contract having become executed, the title of the stock now vests in the plaintiff, and it has the power to sell and dispose of the same: Sisters v. Best, 88 N. Y., 526-543; Millbank v. New York etc. R. R. Co., 64 How. Pr. 20."

Also see:

Miller v. Fleming & Fox Co., supra, 59 S. W., 512.

Also see decision in our own Circuit in the case of

U. S. Saving & Loan Co. v. Convent of St. Rose, 135 Fed., 136.

Thompson on Corporations, Section 6016;
Railroad Co. v. Johnson, 58 Kas., 175, 48 Pac., 847;
Bowman v. Foster & Logan Hdwe. Co., 94 Fed., 592;
Union National Bank of St. Louis v. Mathews, 98 U. S. 621.

In fact, the rule as laid down by the foregoing and other cases is much stronger than is necessary to contend for in this case, for it is well settled that where the contract is executed, the consideration has passed and the conveyance made, the corporation is estopped from questioning it, although the transaction was absolutely ultra vires. In the present case the action, while brought by minority stockholders, is the action of the corporation, the Alice Company, and if the Alice Company could not raise the question as to the transaction being ultra vires because of the consideration being capital stock, the same restriction applies to the action although brought in the name of minority stockholders.

THE SHERMAN ANTI-TRUST LAW.

I.

THE SHERMAN ANTI-TRUST LAW CANNOT BE INVOKED BY STOCKHOLDERS OF A SELLING CORPORATION TO RESCIND AN EXECUTED SALE UPON THE GROUND THAT THE BUYING CORPORATION EXISTS IN CONTRAVENTION OF THE SHERMAN ANTI-TRUST LAW.

The Sherman Anti-Trust Law provides its own penalties in Sections 4, 5 and 6 as follows:

(a) A criminal prosecution;

(b) A suit by the United States, conducted by the District Attorneys and Attorney General to restrain violations of the same;;

(c) The forfeiture of property in transportation;

(d) A suit at law for treble damages by an individual injured.

The only remedy that may be invoked by an individual injured, whether such individual be a stockholder in a corporation and bring the suit in behalf of such corporation, or is acting upon his own account, is that provided for in Section 7,—a suit for treble damages. Injunctive or equitable relief of any character, for conduct contravening the Act, must be sought by the United States through its proper officers.

It is clear upon the authorities that such a suit may not be even brought under the circumstances of this case to prevent threatened action, and if such be not so, much less may such a suit be brought to set aside and rescind a completed sale, as is the subject of the present bill of complaint. We believe the multitude of authorities, including the Supreme Court of the United States, sets this matter at rest.

Wilder Mfg. Co. v. Corn Products Refining Co., 236 U. S. 165; 59 Law Ed. 521;
Boyd v. New York & H. R. Co., 220 Fed., 179;

Corey, et al. v. Independent Ice Co., 207 Fed., 459;
Metcalf v. American Furniture Co., 122 Fed., 116;
Gulf C. & S. Ry. Co. v. Miami Co., 86 Fed., 207;
Pidcock v. Harrington, et al., 64 Fed., 821;
Ames v. Am. Tel. & Telegraph Co., 166 Fed., 820;
Greer Mills & Co. v. Stroller, 77 Fed., 2;
Blindell, et al. v. Hagan, 54 Fed., 41;
Sou. Ind. Express Co. v. U. S. Express Co., 88 Fed., 660;
Block v. Standard Distilling & Distributing Co., 95 Fed. 979.

The Metcalf case, supra, may be quoted from as illustrative of the rulings made by the other Federal Courts upon the various circuits. It is directly in point. The case was first considered by the District Court and reported in 108 Fed., 909. Upon demurrer, the demurrer was sustained for multifariousness. Upon amendment of the bill, the case was reconsidered. In the first decision, by implication, it was held that such a suit could be maintained by dissenting stockholders under the Sherman Act, but in this case, that conclusion is expressly overruled and denied.

This was a suit brought by a dissenting stockholder against the grantor and grantee *to compel a reconveyance of property which it was charged had been conveyed by the grantor through the wrongful act of its officers and stockholders to the grantee, for the purpose of*

monopoly, and in violation of the Sherman Anti-Trust Act. It is therefore on all fours with the case at bar.

The allegations of the complaint are disclosed in the following:

> "The averments of the bill, however, charge the commission of unlawful acts by the directors, in conjunction with the American Company, with the view of injuring the Buffalo Company. The gist of the bill is a conspiracy to injure the corporation of which plaintiff and her associates are minority stockholders. It is set forth in the bill that the corporation has sustained irreparable injury and loss because of such conspiracy existing between the directors of the Buffalo Company and the American Company; that the conspiracy was conceived with the intent to absorb the property of the Buffalo Company, and to pay therefor a sum grossly less than the actual value; and, further, that the object of the conspiracy was and is to promote *an illegal confederacy to restrain trade and commerce and to create a monopoly.* The bill further sets forth that the intent and purpose of the conspiracy was and is to increase and control the price of school furniture in the several states and territories. The bill charges that the consideration of the transfer was secret, that a portion was retained by the directors as a secret profit, and that a price far less than the actual value of the assets of the Buffalo Company was accepted. A portion only of the consideration was paid in cash; the balance being stock in the American Company, which is alleged to be entirely valueless. The entire capital stock of the Buffalo Company, which was organized for the manufacture and sale of school furniture, is divided into 3,500 shares, of the par value of $100.00 each. At paragraph 8 the bill substantially alleges that the American Company was capitalized for $10,000,000.00, all of which was issued for property to the owners of and dealers in school furniture who

joined the unlawful combination in restraint of trade, and that such stock was approximately only of the value of $3,000,00.00. One Million Dollars were borrowed to pay the secret profit to the promoters of the illegal combination."

On page 126, the Court said:

"I do not understand that it is claimed by complainant that this court has the power to take cognizance of the alleged illegal combination because of the provisions of the anti-trust act of 1890. *It has been many times decided, and no longer admits of any question or doubt, that the only party entitled to maintain a bill in equity for injunctive relief for violating the provisions of the anti-trust act is the United States Attorney, at the instance of the Attorney-General.*"

If any doubt existed upon these questions, we think the same has been removed entirely by the decision of the Supreme Court of the United States in the Wilder Manufacturing Company case, supra, decided February 23, 1915, where the subject is very thoroughly discussed by Mr. Chief Justice White, and his conclusions concurred in by the entire court. Among other things, the Court said:

" * * * In the second place, the proposition is repugnant to the anti-trust act. Beyond question, re-expressing what was ancient or existing, and embodying that which it was deemed wise to newly enact, the anti-trust act was intended in the most comprehensive way to provide against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce, or attempts to monopolize the same. Standard Oil Co. v. United States, 221 U. S. 1, 55 L. Ed.

619, 34 L. R. A. (N. S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; United States v. American Tobacco Co., 221 U. S. 106, 55 L. Ed. 663, 31 Sup. Ct. Rep. 632. In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute, but the remedies which it provided, were coextensive with such conceptions. Thus the statute expressly cast upon the Attorney-General of the United States the responsibility of enforcing its provisions, making it the duty of the district attorneys of the United States in their respective districts, under his authority and direction, to act concerning any violations of the law. And in addition, evidently contemplating that the official unity of initiative which was thus created to give effect to the statute required a like unity of judicial authority, the statute in express terms vested the circuit court of the United States with 'jurisdiction to prevent and restrain violations of this act,' and besides expressly conferred the amplest discretion in such courts to join such parties as might be deemed necessary, and to exert such remedies as would fully accomplish the purposes intended. Act of July 2, 1890, Chap. 647, 26 Stat. at L. 209, Comp. Stat. 1913, Sec. 8820.

"It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute, or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a twofold reason: First, because of the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy

can be only that which the statute prescribes.' Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 35, 23 L. Ed. 196, 199; Barnet v. Muncie Nat. Bank, 98 U. S. 555, 25 L. Ed. 212; Oates v. First Nat. Bank, 100 U. S. 239, 25 L. Ed. 580; Stephens v. Monongahela Nat. Bank, 111 U. S. 197, 28 L. Ed. 399, 4 Sup. Ct. Rep. 336; Tennessee Coal, I. & R. Co. v. George, 233 U. S. 354, 359, 58 L. Ed. 997, 999, L. R. A. 1915, 34 Sup. Ct. Rep. 587; Second, because of the destruction of the powers conferred by the statute, and the frustration of the remedies which it creates, which would obviously result from admitting the right of an individual, as a means of defense to a suit brought against him on his individual and otherwise inherently legal contract, to assert that the corporation or combination suing had no legal existence in contemplation of the anti-trust act. This is apparent since the power given by the statute to the Attorney General is inconsistent with the existence of the right of an individual to independently act, since the purpose of the statute was where a combination or organization was found to be illegally existing to put an end to such illegal existence for all purposes, and thus protect the whole public,—an object incompatible with the thought that such a corporation should be treated as legally existing for the purpose of parting with its property by means of a contract of sale, and yet be held to be civilly dead for the purpose of recovering the price of such sale, and then, by a failure to provide against its future exertion of power, be recognized as virtually resurrected and in possession of authority to violate the law. And in a twofold sense these considerations so clearly demonstrate the conflict between the statute and the right now asserted under it as to render it unnecessary to pursue that subject further. In the first place, because they show in addition how completely the right claimed would defeat the jurisdiction conferred by the statute on the courts of the United States,—a jurisdiction evidently given,

as we have seen, for the purpose of making the relief to be afforded by a finding of illegal existence as broad as would be the necessities resulting from such finding. In the second place, because the possibility of the wrong to be brought about by allowing the property to be obtained under a contract of sale without enforcing the duty to pay for it, not upon the ground of the illegality of the contract of sale, but of the illegal organization of the seller, additionally points to the causes which may have operated to confine the right to question the legal existence of a corporation or combination to public authority sanctioned by the sense of public responsibility, and not to leave it to individual action, prompted, it may be, by purely selfish motives.

"As, from these considerations, it results not only that there is no support afforded to the proposition that the anti-trust act authorizes the direct or indirect suggestion of the illegal existence of a corporation as a means of defense to a suit brought by such corporation on an otherwise inherently legal and enforceable contract, but, on the contrary, that the provisions of the act add cogency to the principles of general law on the subject, and therefore make more imperative the duty not directly or indirectly to permit such a defense to a suit to enforce such a contract, we put that subject out of view and come to the only remaining inquiry, the alleged effect of the previous ruling in the Continental Wall Paper case, supra."

Against this array of authorities, there is only the case of Bigelow v. Calumet, etc. Co., which indulges in a serious discussion of the question to the contrary. After demonstrating by a review of the authorities, the doctrine we contend for, the District Court held to the contrary.

The decision was principally based upon the case of Metcalf v. American Furinture Co., 108 Federal, 909, which was reconsidered in 122 Federal, 116, and the rule announced to be as we contend, as is shown by the excerpts from said case hereinbefore set out. The Bigelow case, has been both expressly and impliedly overruled by most other courts, including that of the Supreme Court of the United States. The facts of that case were entirely different from the case we are now considering, so much so that even if the decision were correct it could not be held to be controlling here. The point was neither made nor discussed, in the Bigelow case, in the Circuit Court of Appeals.

If the stockholder or individual may not, when thus injured, maintain a suit for injunctive relief, much less may he maintain a suit for other equitable relief, such as that sought in this action.

The gist of this action is the rescission of the sale of the Alice properties to the Anaconda Copper Mining Company, the cancellation of the deeds of conveyance, and reconveyance of the stock and property from one to the other, all of which is equitable in its nature, and comprehends a redress for the violation of the anti-trust law, which does not fall within any of the terms of the remedies provided for therein. The relief here sought is grounded squarely upon the Sherman Anti-Trust Act, and the remedies therein provided, and if it cannot be obtained upon the ground upon which it is sought, it may not be obtained at all.

Thus far we have discussed the question of the right of an individual or stockholder to equitable relief under the Sherman Anti-Trust Law, either before or after the consummation of the act complained of, and the authorities which we have cited necessarily support the proposition which we are now to discuss more fully, that after the consummation of the transaction, and the execution of the contract, dissenting stockholders of the Alice Company cannot maintain a suit to compel re-conveyances, and rescind and cancel title deeds, for the reason that the purchase of the property of the Alice Company by the Anaconda Company was for the purpose, entertained by the buyer, of restraining trade or monopolizing the copper industry.

Whatever may be said of the right of a stockholder of the buying Company to prevent, by injunction, a purchase by his own Company, violative of the Sherman law and with the intent to monopolize interstate trade and commerce, we hold it to be beyond any known principle to permit either the selling corporation or a stockholder thereof to undo a completed transaction upon the ground that it had its inception in a purpose entertained by the buyer, which contravened public policy.

The present suit is a suit by stockholders on behalf of the Alice Company. If it might not be maintained by the Alice Company, upon the ground stated, it may not be maintained by stockholders thereof.

This is clearly demonstrated by the equity rules of this court, which expressly provide that before a stockholder may maintain a suit in behalf of the corporation, he must make every reasonable effort to secure the suit to be brought by the corporation. If a stockholder might, on behalf of the corporation, maintain a suit which the corporation itself could not maintain, then a demand upon the corporation to bring a suit which it cannot maintain would simply be an idle performance, not required by any rule of equity.

The sale of this property by the Alice Company to even a known trust was not ultra vires, for the Alice Company had a right to sell its property. It was not immoral, neither was it illegal, because there is no law prohibiting the sale of property to a corporation or an individual whose business may be conducted in restraint of interstate commerce.

Such sale upon the part of the Alice Company was not void on account of the alleged trust character of the purchaser, neither was the title vested in the purchaser void on account of its alleged trust character; neither was it voidable at the suit of any one whomsoever, except the Government of the United States.

Indeed, the policy of disturbing as little as possible the property and property rights of unlawful combinations, has numerous times been approved by the Supreme Court of the United States. In American Tobacco Company, 221 U. S., page 185, in speaking of the

principles which should be kept in view in rectifying the unlawful conditions which existed, the court stated one of those to be a "proper regard of the vast interests of private property which may have became vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning."

Assuming the sale to have been for a fair price, and that must be assumed, when considering complainants' cause of action upon the sole ground of a violation of the anti-trust act, neither the Alice Company nor any stockholder was injured in the least by the sale of the property to the Anaconda Company, though a trust, neither was it or they subjected to any penalties whatsoever.

If indeed, the case has shown that there was such a unity of interest between the Anaconda Copper Mining Company and the Alice Company, or such a common directorate, as to avoid the sale unless it was for full value and absolutely fair, this question must be dealt with independently of the allegations in reference to the Sherman Anti-Trust Act and under the proper subdivisions of complainants' bill.

The authorities abundantly affirm the doctrine, that after a transaction contrary to public policy, is consum-

mated, it may not upon that ground be rescinded, but the law will leave the parties in exactly the position in which they had placed themselves, *and the law implies a contract between the parties which is enforceable, that neither will attempt to undo that which has already been done.*

Boyd v. New York & H. R. Co., 220 Fed., 179;
Wilder, etc. v. Corn Products, etc., 236 U. S., 165;
Metcalf v. Am. Furn. Co., 122 Fed., 116;
Camors-McConnell Co. v. McConnell, 140 Fed., 415;
Conley v. Union Sewer Pipe Co., 184 U. S. 547;
Santa Cruz v. Wykes, 202 Fed. 372;
Houston, etc. v. Texas, 44 U. S. Law Edition 688.

The Boyd case, supra, was a suit brought for the purpose of undoing certain contracts and avoiding certain executed conveyances claimed to be in contravention of the Sherman Anti-Trust law, as well as for preventive relief against future wrongs. The court said:

> "If the lease of 1873 created a control or unity of competing interests forbidden by the Sherman Act, the fact that such obnoxious arrangements long antedate that statute does not render the act inapplicable.
>
> "Complainants, however, have no standing to demand in this private litigation the abrogation of the lease, the restoration of the status of 1873, nor the sale by the Central of its Harlem stock. Such efforts are a usurpation of the functions of the executive; it does not lie in the power of private citizens to assume at will the duties of an Attorney

> General. (This was suit by stockholders). Actions thus privately brought would be even more privately settled. The certain scandal and endless confusion resulting from such freedom of action are the sufficient reasons for cases like National Fireproofing Co. v. Mason, 169 Fed. 259."

The Metcalf case, supra, is exactly analagous, as we have hereinbefore pointed out upon the facts, to the one we are now discussing. The exact situation now being canvassed was therein presented, and among other things it was said:

> "The contract to purchase the plant of the Buffalo Company, in view of the determination of that Company to dissolve and discontinue business, was an enforceable contract. The American Company could not refuse to pay for the property bought, because of an asserted illegal combination; nor could the Buffalo Company refuse to convey after agreeing to do so. Such being the status of the vendor and vendee, complainant must be relegated to another remedy than that which she pursues for a vindication of any wrongs or damages sustained by her at the hands of the directors. As already stated, no fraud in the management of the corporation or in the action of the majority stockholders is asserted in the bill, except inferentially, from the general charge of conspiracy to stiflle competition in trade. The complainant could not prevent or control the lawful management of the affairs of the corporation, nor the discretion exercised in the sale of the property, unless it appears that such acts were ultra vires or in fraud of complainants' rights. The pleadings do not disclose such facts. Nor can the Company equitably rescind the sale because of any secret profit by the directors, or owing to their acceptance of an inadequate consideration. * *

* In referring next to the actual transfer and its effect, it must not be overlooked that this was an executed contract. * * * All prior transactions leading to a sale of the property and a dissolution of the corporation were ratified by a positive majority of the stockholders on March 2, 1899. Having in mind the legal distinction between the right which the corporation possesses to rescind a contract on account of fraud and by reason of acts claimed to be ultra vires, how can it be insisted that the solemn contract made between the Buffalo Company and the American Company should be set aside, after it had become executed, in obedience to the behest of the complainant. Her right, as heretofore stated, is not enlarged beyond that of the corporation. Her status is accordingly narrow and circumscribed. Title to property and its possession having passed to the grantee, the corporation is estopped from seeking a rescission of its contract. *A stockholder standing in the shoes of the corporation likewise is estopped from asserting the invalidity of such an act.* A court of equity would undoubtedly, at the suit of a stockholder, enjoin a threatened act by the corporation beyond its granted powers. But it is strenuously urged by complainant that the ultra vires acts invalidated the contract of sale. I think the weight of authority is against an interpretation of the doctrine of ultra vires as claimed by complainant. * * * 'It is a principle of universal application that whenever an illegal, immoral, or prohibited contract has been duly executed on both sides, the law will not lend its aid to either of the parties for the purpose of unraveling it and enabling him to recover what he may have lost through it.' In such cases the governing maxim is, 'In pari delicto potior est conditio defendentis'. When therefore, a contract with a corporation, the making of which is beyond its granted powers, has been duly executed by both parties, neither of them can assert its invalidity as a ground of relief against it."

In Diamond Match Co. v. Kover, 106 N. Y., 374, the court said:

> "We are not aware of any rule or law which makes the motive of the covenantee the test of the validity of such a contract; on the contrary, we supposed a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by the consideration, will depend upon the reasonableness as between the parties."

Nowhere in the act is it provided that the acquisition of property by illegal combinations shall be, by reason of such fact, void, nor that any penalty shall be visited upon the corporation by the taking away of that property from it, unless, indeed, such may be done at a suit of the United States for the purpose of dissolving a monopoly, and then the property is only distributed in such a way as to prevent the monopolizing influences, and is never in any event given back to the purchaser.

Even admitting the sale of the property by the Alice Company to the Anaconda Company to have been in contravention of public policy, the wrong related to the public, and after the sale was completed, no injury, either in person or in property rights, arose which could be redressed by a suit either of the Alice Company or its stockholders.

As stated in Wilder Mfg. Co., supra, by Mr. Chief Justice White, the injury intended to be prevented is a public injury, and agencies have been provided therein for its redress. Whatever ethical standards the complainants, stockholders, may have erected for them-

selves in relation to the propriety of the sale of the Alice property to a claimed trust or illegal combination, courts of equity cannot give effect thereto. High ideals are commendable, but when dissociated from personal or property wrongs to the complaining parties, violation of the same is not actionable.

In the case of Santa Cruz v. Wykes, supra, in discussing the question of the rescission of executed contracts made ultra vires, this court said:

> "The principle applies not as an estoppel to the corporation, where the ultra vires contract is still executory, to set up its incapacity to entertain it; but where the contract has been executed—that is, fully and completely performed on both sides—the court will not interpose to restore either party his former estate, or grant other relief, but will leave the parties where it found them. * * * But in a much earlier case the doctrine is affirmed that though an illegal contract will not be enforced by the courts, yet where such a contract has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise express or implied and the transaction will not be unraveled for the ascertainment of its origin."

In the case of Houston & T. C. Ry. Co. v. Texas, U. S. 44 Law Ed., foot page 688, wherein the Supreme Court of the United States was discussing the rescission of a contract entered into in violation of law and in contravention of public policy, it was said:

> "After the complete execution of the transaction, it must be that each party thereupon and at

> once, becomes possessed of certain legal rights arising from its performance. Neither party could undo what had been fully executed and completed, and the law therefore implies a contract, that neither party will attempt to do so; or, in other words, the law implies a contract that the payments made shall not be thereafter repudiated or denied. Any subsequent statute of the state, which repudiated or permitted the repudiation of the payments, would impair the obligations of the contract which the law raises from the transaction itself."

See also Long v. Georgia Pacific Railway Company, 91 Ala. 519;

Illinois Trust & Savings Bank v. Pacific Railway Company, 117 Cal., 332;

Planters' Bank v. Union Bank, 16 Wallace, 500.

But why pursue the subject? There is no contrariety or dissent in the authorities. This case falls within none of the exceptions or modifications of the rule. Clearly the Alice Company could not be granted relief in this suit. The plaintiff stockholders sue in a representative capacity. They do not sue as beneficiaries. Suing in a representative capacity, they cannot have relief on behalf of the Company, which the company could not obtain upon its own behalf.

While this case does not proceed upon any common law theory, but is grounded wholly, as hereinbefore pointed out, upon the anti-trust act, it may not be impertinent to say that laying aside the anti-trust act, a

stockholder could not, at common law, under circumstances of this character, maintain a suit to rescind the sale.

A very full and learned discussion of this question may be found in Metcalf v. American Furniture Co., 122 Fed. 116, cited supra, and hereinbefore quoted from at length.

From this case, and the authorities cited, it will be observed that no suit would lie at the common law under circumstances of this character on behalf of a stockholder to rescind the sale, and for like reasons the sale cannot be rescinded under the Sherman Anti-Trust Act.

II.

THE PURCHASE OF THE ALICE PROPERTIES WOULD NOT TEND TO EFFECTUATE ANY ILLEGAL PURPOSE TO MONOPOLIZE INTERSTATE COMMERCE IN COPPER, AS ALLEGED IN COMPLAINANTS' BILL, AND WOULD TREREFORE NEITHER BE ILLEGAL NOR AGAINST PUBLIC POLICY.

The allegations contained in complainants' bill, and whatever proof they had, was directed to establishing that the Amalgamated Copper Company was formed with the purpose of monopolizing commerce in copper, and that the acquisition of the Alice properties was in the pursuit of such purpose. The undisputed evidence is that the Alice properties never were, and are not,

copper producing. A great amount of development work has been performed upon the properties, and very large amounts of ore taken therefrom, the product of which has always been silver and gold and zinc. If any copper whatever is contained in the ores, its value is entirely negligible. Even its *situs* would not lead to any reasonable probability that any expenditures, however large, would result in its becoming copper producing. It is not within reasonable proximity to the copper zone, and practically all other properties upon the same lode have produced silver and gold and zinc. It clearly appears from the testimony of all who testified upon the point that it was its prospective zinc and silver values which induced the purchase, and that at the most the purchase was only speculative, and its future value entirely dependent upon the development of future processes adapted to the treatment of zinc ores of the character contained therein. Even though the purchasers may have entertained a hope, under such circumstances, that copper might subsequently be found in the properties, the conclusion of the court cannot be based upon the same. Since then the productive power of the properties has been limited to metals other than copper, and it is apparent that the acquisition of these properties would not tend in the least to effectuate the evil purposes charged against the Amalgamated Copper Company in this suit, and not tending towards monopoly in this designated metal, the purchase would be entirely legal and not contrary to public policy, and certainly not inhibited by any provision of the anti-trust

act. Not only this, but the acquisition of the property would be entirely collateral to the evil purposes charged against the wrongdoer; being collateral to such evil purposes, the law recognizes such a purchase as being free from any vice whatever, and it will not only sustain the same after the transfer has been accomplished, but if a contract of purchase existed between the parties which was entirely executory, specific performance would compel a compliance therewith. This is distinctly ruled, as we take it, in Connolly v. Union Sewer Pipe Company, supra, and the general principles will be found discussed in

Section 355, Moore on Interstate Commerce,

and standing alone, this one proposition would, in our judgment, and must necessarily, defeat the plaintiff's claim that the sale of these properties ought to be rescinded because violative of the Sherman Anti-Trust Act, in that they tend to a monopoly in the copper commerce of the country.

III.

NEITHER THE AMALGAMATED COPPER COMPANY NOR THE ANACONDA COPPER MINING COMPANY WAS AT THE TIME OF THE PURCHASE OF THE ALICE PROPERTIES, NEITHER HAD THEY EVER BEEN, ILLEGAL COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE, AND THE ANACONDA COMPANY, UNDER THE CIRCUMSTANCES

DISCLOSED IN THIS CASE, HAD THE LEGAL RIGHT TO ACQUIRE THE ALICE PROPERTIES FOR THE PURPOSES AND IN THE MANNER IN WHICH THEY WERE ACQUIRED.

In approaching this subject, it is necessary to inquire somewhat into the allegations of complainants' bill, and to discover whether or not these allegations are sustained by the proof.

Aside from the allegation that in the year 1899 certain individuals, with a view among other things, to control the production of copper and the supply thereof, and to fix and regulate the price thereof in the markets of the world, and to suppress competition in the sale theerof, organized the Amalgamated Copper Company, or caused the same to be organized, no essential material controverted allegation of complainants' bill has been supported by any evidence whatever. The allegation as to the intent with which the Amalgamated was organized is supported only to a limited extent by the testimony of Lawson, given under circumstances and in a manner which discredit it, and which is fully contradicted by the testimony of Burrage, as well as by fifteen years of unimpeachable conduct upon the part of the Amalgamated. All other material allegations controverted in this case have not only no testimony to support them on the part of the complainants, but are emphatically disproved by uncontradicted and credible testimony.

There is no testimony whatever tending to establish

the allegation that the acquisitions of the Amalgamated of the stocks of the various mining companies in Butte were for the purpose of monopolizing interstate trade in copper products; neither is there any proof that in the year 1910, with such illegal purpose, and more effectually to carry the same out, the Amalgamated deemed it advisable for the Anaconda to become invested with the physical properties and with the title to the same, or to all the properties which, by development or operation, might give rise to any competition in the production or sale of copper. Neither is there any proof that the Amalgamated, in association with the Anaconda Company, for a like purpose, purchased the Clark properties. On the contrary, the proof distinctly shows that such was not the purpose. Neither is there any proof that the Amalgamated, with any evil purpose, or otherwise or at all, caused the Butte Coalition Company to be organized, or that it ever held a majority or controlling interest in said Company. On the contrary, the proof is positive that neither the Amalgamated nor the Anaconda had anything whatever to do with the organization of Butte Coalition, and that Amalgamated never at any time owned to exceed 50,000 shares of an issued capital stock of 1,000,000 shares, in said Company.

Neither is there any proof that the Amalgamated or the Anaconda Company ever caused the Butte Coalition Company to acquire a majority of the stock of the Alice Company.

Neither is there any proof that the Amalgamated or Anaconda, prior to the year 1910, controlled and dominated the business and affairs of the Alice Gold and Silver Mining Company, or elected boards of directors of the Alice Company, or that they were ever in possession of the said Alice Gold and Silver Mining Company.

Neither is there any proof that the Amalgamated or the Anaconda Company caused a meeting of the stockholders of the Alice Company to be held for the purpose of transferring the properties of the Alice to the Anaconda, or that they, or either of them, controlled the meeting of such stockholders. Neither is there any proof that the directors of the Alice Company acted under the direction or control of either the Amalgamated or Anaconda, but on the contrary the testimony shows that if any influence whatever was exercised over the Alice Company, its stockholders and directors, it was the influence which the Butte Coalition legitimately exercised by virtue of its ownership of a majority of the stock of that company; that the Butte Coalition Company was not related in any way, or in the least, under the legal domination of either the Amalgamated or the Anaconda, and that at no time did either of said companies own more than one-twentieth of the total issued capital stock of said Butte Coalition Company.

Thus understood, the sole question is here presented whether this sale may be avoided by stockholders of the

Alice Company on account of the relations existing between the Amalgamated Company and the Anaconda Company, such Amalgamated Company owning a majority of the stock of the Anaconda Company, the Anaconda Company being the purchaser; on account of the alleged trust character of the Amalgamated Company itself, claimed to have arisen out of the magnitude of its investments in the stock of Butte mining companies, and a claimed intention of its promoters, existing in 1899, to control the production and price of copper.

We do not understand the complainants, either by allegation or proof, to assert that either the Anaconda Company or the Amalgamated Company have ever restrained interstate trade in copper, or that they have ever, in the legal sense, monopolized the copper business in the United States, or, so far as commerce therein is concerned, between any of its states. Neither do they claim that either of said companies has ever brought about any of the evils against which the Sherman Anti-Trust Law is directed, and which are tersely stated in the Standard Oil case to be:

(a) Raise the prices to the consumers of the articles they affect;

(b) Limit their production;

(c) Deteriorate their quality.

But we understand it to be claimed that the Anaconda Company, by its acquisition of mining properties in the Butte District, and the Amalgamated Company

by its control of the majority of the stock of the Anaconda Company at the time of the acquisition of the Alice properties, had the *power* to restrain competition in copper products, and that such power alone rendered them inimical to the law in question. Complainants' position can be better stated in the language of their brief. By devious reasoning and inapposite authorities, they reach the following conclusion:

> "If a combination tends to defeat competition, it is unlawful. Such was the character of the combination which has been the subject of this study." (Appellants' brief, page 139.)

A new phase indeed, and wholly inadequate as a definition of a combination rendered illegal by the anti-trust law; and a phrase which we venture to assert has never received deliberate judicial approval, and which does not measure to the standard established by the decisions of the Supreme Court of the United States. That it omits many elements which must be included before a combination becomes obnoxious, and that it is incorrect is clearly disclosed in many cases, including the Du Pont case, 108 Federal, 127, from which we quote the language of the Circuit Court of Appeals, written by Judge Lanning, and concurred in by Judges Gray and Buggington:

> "A number of bills were introduced in the Fiftieth Congress (in August and September, 1888) designed to make unlawful every combination 'to prevent competition' and 'to prevent full and free competition' in the sales of articles transported from one state to another. None of them was en-

acted into law. On December 4, 1889, Mr. Sherman introduced into the Senate of the Fifty-first Congress a bill which declared unlawful every combination 'to prevent full and free competition' in such sales. After much debate the bill was, on March 27, 1890, referred to the Committee on Judiciary, and on April 2, 1890, that Committee reported to the Senate with an amendment, drawn by the late Senator Hoar, striking out all after its enacting clause and substituting therefor the act as we now have it. As enacted, it does not condemn every combination 'to prevent competition.' What it condemns is every combination in restraint of trade or commerce among the several states, etc. When the bill went from the Senate to the House, the latter body amended it by inserting a provision extending the scope of the act to all agreements entered into for the purpose of 'preventing competition' either in the purchase or sale of commodities, but the amendment was disagreed to. While there is a 'general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body' (United States v. Freight Association, 166 U. S. 318, 17 Sup. Ct. 540, 41 L. ed. 1007), that rule 'in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted' (Standard Oil Co. v. United States, 221 U. S. 50, 31 Sup. Ct. 512, 55 L. ed. 619 (34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734), decided May 15, 1911).

"There is a distinction between restraint of competition and restraint of trade. The latter expression had, when the Anti-Trust Act was passed, a definite legal signification. Not every combination in restraint of competition was, in a legal sense, in restraint of trade. Two men in the same town en-

gaged in the same business as competitors may unite in a copartnership, and thereafter, as between themselves, substitute co-operation for competition. Their combination restrains competition, and if their town is located near the line between two states, and each has been trading in both states, their combination restrains competition in interstate trade. But it does not necessarily follow that such restraint of competition is a restraint of interstate trade and commerce. The determination of whether it be so must depend upon the facts and circumstances of each individual case. It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish such trade. But this being true does not read into the statute a denunciation of all agreements that may restrain competition without regard to their purpose or direct effect to restrain 'trade or commerce among the several states.' To what extent the Anti-Trust Act condemns combinations that restrain full and free competition in interstate trade is a question that has been much debated. For a dozen years, at least, it has been settled that it does not condemn combinations which only indirectly, remotely or incidentally restrain interstate trade.

"The recent decisions of the Supreme Court in Standard Oil Co. v. United States, and American Tobacco Co. v. United States, 221, U. S., 106, 31 Sup. Ct. 632, 55 L. Ed. 663, make it quite clear that the language of the Anti-Trust Act is not to receive that literal construction which will impair rather than enhance freedom of interstate commerce. As we read those decisions, restraint of interstate trade and restraint of competition in interstate trade are not interchangeable expressions. There may be, under the Anti-Trust Act, restraint of competition that does not amount to restraint of interstate trade, just as before the passage of the

act there might have been restraint of competition that did not amount to a common-law restraint of trade. This fact was plainly recognized in United States v. Joint Traffic Association, 171 U. S. 505, 567, 19 Sup. Ct. 25, 31, 43 L. Ed. 259, where Mr. Justice Peckham said:

"'We might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade. We are not aware that it has ever been claimed that a lease or purchase by a farmer, a manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade within the legal definition of that term.'"

Ex-President Taft, in his work on "The Anti-Trust Act and the Supreme Court," after a thorough study of the decisions of the Supreme Court in cases arising under the Anti-Trust Act, says:

"The effect of the cases is that a mere union of capital in the same branch of industry, for the purpose of promoting economy and efficiency, though it uses interstate commerce, and though to the extent of the business of the two firms or companies it suppresses the competition of each against the other, is not within the statute unless what is done necessarily has the effect to control all the business or can be shown by the character of the acts to be intended to effect that purpose or to be a step in the plot to bring it about. Mere bigness is not

an evidence of violating the act. It is the purpose and necessary effect of controlling prices and putting the industry under the domination of one management that is within the statute." (Page 112.)

Again he says:

"The object of the anti-trust law was to suppress the abuses of business of the kind described. It was not to interfere with a great volume of capital which, concentrated under one organization, reduced the cost of production and made its profits thereby and took no advantage of its size by methods akin to duress to stifle competition with it. I wish to make this distinction as emphatic as possible, because I conceive that nothing could happen more destructive to the prosperity of this country than the loss of that great economy in production which has been and will be effected in all manufacturing lines by the employment of large capital under one management." (pp. 126-7.)

We apprehend that a prolonged discussion of the alleged trust character of the Amalgamated Copper Company, disassociated from the relations which it held to the Anaconda Company at the time of the transaction which resulted in the acquisition of the Alice property, will not, in view of the circumstances of this case, greatly aid the court in deciding the question at issue, for at the time of the acquisition of the Alice property, the Amalgamated had ceased to control, by stock ownership, the various Butte companies in which it originally purchased stock, for it will be remembered that all the property of such companies had been purchased outright by the Anaconda Company, and the relations of

the Amalgamated Company to the Anaconda Company were merely that of a majority stockholder in that company, subject to the same rights and privileges and responsibilities as any other majority stockholder in that company would be subject to, for transactions carried out by the Anaconda Company.

However, it may be said that at no time in the history of the Amalgamated Company did it, through its stock ownership, monopolize interstate commerce in copper, neither did it attempt to do so; neither did it ever have the *power* to do so. Neither does the evidence disclose that it was guilty of any act which was illegal, unlawful or indicated that it was either in effect or purpose an illegal combination under the Sherman anti-trust law.

Undoubtedly it was originally organized because it was believed that the acquisition of stocks in valuable mining properties would be a profitable business venture. Its ownership of these stocks never produced any of the evils against which the anti-trust law is directed. There is no evidence that it used its power to enhance the selling price of copper or to limit the production thereof, or to depreciate the quality of the product. The manner of its acquisition of the stocks of the several companies was wholly unobjectionable, and bears no indication of having been unfair or having been obtained by illegal practices. It does not appear that it ever interfered with the internal control of the several companies.

The aggregate of capital finally employed in the acquisition of these stocks was large. Much stress appears to be laid upon this point by complainants' counsel. Undoubtedly the stocks were worth what was paid for them, and they were paid for in cash. Figures are always relative; while large in the aggregate, this sum may have been, and doubtless was, small in proportion to the aggregate amount of capital which would have been required to have obtained a monopolistic control over the production of copper in the United States.

No inference of evil can therefore be drawn from the amount of capital invested.

Much space is allotted in argument to inquiries as to why the promoters of this company did not acquire and own individually the stocks that they desired, instead of forming a corporation for the ownership of the same. We have been utterly unable to grasp the materiality of the inquiry. The control of the promoters, by personal ownership of the stock, would have been as complete as that of the corporation by its ownership of the same. The corporation was entirely legal. Its right to purchase stock is undisputed. No inference of wrongdoing can be drawn from any act, however, performed, if the same is legal and embraces no evil purpose. Monopoly of individuals is as offensive as monopoly of corporations. It therefore appears to us wholly immaterial whether these stocks were held by individuals collectively or collectively by a corporation. It has been too often adjudged to be longer open to dispute, that the mere form which a combination takes is immaterial,

but that the law, ignoring forms, looks to the substance, purpose and the result of the prohibited act.

During the control of these companies by the Amalgamated, the production of copper from the Butte mines, instead of decreasing, constantly increased. The sales of the same increased. There was no stifling of either production or competition. Although this production increased, it did not increase in the same ratio as the production of the United States as a whole. That production almost doubled. And it must be said, that if there was any purpose in the promoters of the Amalgamated Copper Company, through it, to monopolize the copper industry in the United States, that Company proved ineffectual to carry out such purpose, and not having the power to do so, any intention of the original promoters in that regard has proven to be wholly immaterial.

At a time when these companies controlled by the Amalgamated Copper Company, produced proportionately more of the copper of the United States than they did in 1910, the Supreme Court of the State of Montana, in the case of MacGinniss v. Boston and Montana, 29 Montana, 428, had under review its alleged unlawful character. The question arose under the constitution of the State of Montana and our local law, designed to prevent trusts and combinations. It must be said that these laws reached all the evils designed to be prevented by the Sherman anti-trust law, insofar as

these evils affected the local situation. Indeed, our Constitution and statute are both more specific and broader in their provisions, if that were possible, than the law now under consideration.

(a) In that case it was held that a private individual could not undertake to enforce such laws, by a suit in equity; that this was the duty devolving upon the state.

(b) That the Amalgamated Copper Company had the right to acquire the stocks of the various companies which it acquired, provided that acquisition was not for the illegal purpose of restraining trade; in other words, that there must be an evil intent in the acquisition that it will result and is for the purpose of contravening the statute and the constitutional provisions.

(c) The Amalgamated Copper Company had done nothing which would indicate any purpose to control commerce or to create a monopoly.

(d) That the mere possession of power upon the part of the Company to restrain trade, if it chooses to exercise it, is not sufficient to bring it within the punishments provided by law, and before it could be reached it must put that power into exercise.

We believe this decision not to be at variance with any controlling decision of the Courts of the United States, the same having been substantially held in many cases entirely analagous upon principle with this. But as we have above indicated, we believe that the situa-

tion of affairs, the relative position of the Anaconda Company in the copper world, the purpose, intent and effect of its acquisition of the Alice properties and other Butte properties, which it acquired in the year 1910, in connection with the relation borne to the Anaconda Company by the Amalgamated Company, which was at that time that of a majority stockholder, and the further fact that neither the Amalgamated nor the Anaconda Company, in the year 1910, had the power to monopolize, either geographically or distributively, interstate commerce, and that the acquisition of the Alice properties did not render the acquisition of such power dangerously probable, are the questions of concern in determining whether such acquisition was contrary to the Sherman Anti-Trust Law.

At that time, and for many years prior thereto, all the properties of all the companies formerly controlled by the Amalgamated Company, through stock ownership, and afterward acquired by the Anaconda Copper Mining Company, in which the Amalgamated Company owned a majority of the stock, and all other acquired properties, produced only about twenty-one per cent of the copper of the United States. The proportion produced by those companies of the whole in the United States had, for many years, decreased.

The acquisition of these properties by the Anaconda Company was an acquisition by purchase. True, they were not paid for in cash. We can hardly comprehend

that a transaction becomes abnormal or unusual, simply because the purchaser must borrow the money, or because the purchaser issues stock in payment therefor.

However, this is of little consequence in the ultimate resolution of this question. Certainly none of the evils of monopolies either followed or preceded the acquisition of the copper properties at Butte by the Anaconda Copper Mining Company, and this must be one of the controlling tests in determining whether the combination effected was an unreasonable combination in restraint of trade and commerce.

No control had been exercised over the price of copper to increase it to the consumer. There had been no limitation of production, for the production was constantly increasing. There had been no deterioration in the quality of the product; no censurable influences had been brought to bear upon competitors; wages and working conditions had constantly improved.

Neither the Amalgamated nor the Anaconda Company had acquired the preponderate position in the copper business, nor sufficient power to render their acquisition repugnant to the Sherman Anti-trust law, and the acquisition of the Alice properties did not render it dangerously probable that they would acquire such preponderate position, or if acquired, that they would use the same in violation thereof.

The controlling reasons, and that which induced these various acquisitions of property, are clearly set

out by the testimony in the record. They were substantially as follows:

(a) Very large economies in management and production; thus enabling weak companies to continue operation;

(b) The final settlement and adjustment, as between stockholders and companies with divergent interests, without litigation, all apex rights upon which the very life of several of the companies depended,—rights of similar difficulties and of similar natures, as those which had formerly caused the Butte operators to waste their substance in violent and destructive litigation, and thus obviating large expenditures to determine the respective rights in relation to these matters.

(c) The acquisition of new properties to prolong the life of the Anaconda Company and make up for ore depletions which were constantly occurring in the natural operation of the same. In this regard, it was immaterial whether such acquisitions produced copper, silver, gold or zinc, provided they resulted in profit and took the place of depleted ore reserves.

That these were the prime factors leading to all acquisitions by the Anaconda Company of properties in the Butte District is made clearly to appear from the testimony of C. F. Kelley, set out in the foregoing statement, subdivision IV, and that they were legitimate and proper, and that such acquisitions would, in the long run, tend not to restrain interstate commerce

in copper, but to facilitate the same, must be seen by anyone with a knowledge of the mining industry, and particularly anyone with a knowledge of mining events in the copper world.

Indeed, upon the results sought to be obtained by these acquisitions, would ultimately depend the very life of the mining industry in this state. For many years the general production in the United States has been rapidly increasing. Year after year the Butte properties produced less in proportion to the aggregate than formerly. Year after year, the demands for wages, and the expense of supplies and the requirements of improved mining conditions, have been enhancing the cost of production. Year after year the Butte mines have been growing deeper, and the ore reserves were becoming baser.

Mr. Gillie's testimony shows that with all the acquisitions of the Clark and Heinze properties, at the time the Alice properties were acquired the total ore reserves were not as great as they were in the several mining properties which were originally controlled through stock ownership by the Amalgamated Copper Company. (See Tp., Vol. 1, page 407). In the meantime, almost inexhaustible porphyry deposits had been developed in Utah, Nevada, Arizona and New Mexico, where the copper, instead of being taken from 3,000 feet beneath the surface of the earth, was being taken out by steam shovels, and which production it is a matter of current history and known to court as well as to

all, was much cheaper than the Butte District, and the amount of such production almost without limit.

Therefore, unless such economies could be brought about, and the life of the Butte mining camp extended, and apex controversies satisfactorily adjusted, it was inevitable that in the course of a few years the Butte district must cease to be a substantial competitor with the other copper companies of the United States.

Such being the purposes and objects of these acquisitions, and such purposes and objects being necessarily essential to the welfare of the companies, then any result, if any followed, tending to restrain interstate trade in this product would be indirect and not condemned by the Sherman law, and any restraint occurring therefrom would not be unreasonable according to the authorities.

We invite the Court's attention to Bigelow v. Calumet & Hecla, 155 Federal, 869; same case, 167 Federal, 704 (District Court); same case, Circuit Court of Appeals, page 721. On page 712, it was said:

> "We are thus brought to the question whether the necessary effect of the alleged combination is to restrain trade or create a monopoly. It is settled that a combination does not violate the Federal Statute merely because it may indirectly, incidentally, or remotely restrain trade or tend toward monopoly. If its necessary effect is to stifle or to directly and substantially restrict interstate commerce, it falls under the ban of the law. On the other hand, if it only incidentally or indirectly restricts competition, while its main purpose and chief effect are to promote the business and in-

crease the trade of the consumers, it is not denounced or voided by that law."

In the opinion of the Circuit Court of Appeals, affirming this case, on page 725, it is said:

"It is therefore well settled that it does not apply to restraints or monopolies as such, but only to those which directly and immediately, or those which necessarily affect commerce among the states or with foreign nations. If the law were held applicable to contracts or combinations indirectly or remotely affecting such commerce, it would substantially obliterate the distinction between interstate and intrastate commerce."

Again:

"The power of stock control which the Calumet Company has acquired, may be exercised only in legitimate and lawful ways in the interest of economical management of both companies. In that case it has done nothing affecting commerce among the states. On the other hand, that power may be a mere preparation for the doing of acts which will directly and necessarily interfere with the freedom of that kind of commerce which it is the purpose of Congress to protect. When this unlawful use of the power shall result in an unlawful restraint, or further steps shall point to results directly affecting such commerce, there may be interference by the courts."

Again:

"In a very convincing opinion, the judge who heard the case below states the leading facts which made it desirable and economical that there should be, to a certain extent, a co-operation in future mining operations by the two companies, in order

> that certain poorer lodes underlying the conglomerate lode of the Calumet Company, which has been worked to a point where exhaustion is in sight, may be worked to the best advantage of both companies. We shall not go into the details. We refer and adopt the conclusion stated by Judge Knappen: 'I am convinced, from a careful consideration of the testimony, that the controlling motive and purpose of the Calumet & Hecla Company in acquiring its interest in the mining properties mentioned, was to extend its industrial life, and keep up and increase, if possible, its production and net earnings, and that the evidence fairly negatives a design thereby to reduce the output of any of the companies or artificially to increase or maintain the price of the product, or to stifle competition between the related companies, or to prejudice other stockholders generally of either company associated, or to interfere with the integrity of either company, a common management with separate detailed organization being contemplated. The evidence does not indicate that any use of the facilities of the associated companies is contemplated, except upon terms and in manner mutually advantageous.'"

By reference to the first citation, 155 Federal, it will be disclosed that the issues in this case included not only a mere combination in production by a combination in the marketing and sale of the copper products in interstate commerce. The authority of the case is vigorously assailed by the appellants by the assertion that the same has been practically overruled, and it is said that the decision is grounded squarely upon the Knight case, which it is said has been modified to such an extent as to make it inapplicable. We say, however, that

the facts of the Bigelow case being analagous, and the reasoning of the several decisions sufficient to sustain the conclusion, that the fact, if it be such, that the Knight case was approvingly mentioned in the opinion and that it was not in all respects applicable, does not destroy the force of the precedent, and that enough remains in the argument to show, together with the authorities cited, that notwithstanding any misapplication of the Knight case to the facts of the Bigelow case, the decisions must necessarily have been the same.

In the Standard Oil case, the following from the case of Hopkins v. United States, was quoted with approval:

> "To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act."

The rule announced in the Standard Oil and Tobacco cases, that in order to be inhibited, the restraint accomplished must be unreasonable and undue, is the corollary of the rule in relation to direct and indirect effect, to which we have heretofore referred, and whichever principle is appealed to, both being substantially alike, the same result will be attained. In the Standard Oil case, the rule of unreasonable restraint is thus stated:

> "Without going into detail and but very briefly surveying the whole field, it may be with accuracy

said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy."

After analyzing the statute, the court said:

"The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

"c. And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be

> illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the the statute provided."

Again it is said:

> "In other words, that freedom to contract was the essence of freedom of undue restraint on the right to contract."

The rule was further elucidated, and all obscurity entirely removed by its restatement in the case of The United States v. American Tobacco Company, wherein, on page 178, it is said:

> "The obscurity and resulting uncertainty, however, is now but an abstraction because it has been removed by the consideration which we have given quite recently to the construction of the Anti-trust Act in the Standard Oil case. In that case it was held, without departing from any previous decision of the court that as the statute had not defined the words restraint of trade, it became necessary to construe those words, a duty which could only be discharged by a resort to reason. We say the doctrine thus stated was in accord with all the pre-

vious decisions of this court, despite the fact that the contrary view was sometimes erroneously attributed to some of the expressions used in two prior decisions. (Citing cases.) That such view was a mistaken one was fully pointed out in the Standard Oil case and is additionally shown by a passage in the opinion in the Joint Traffic Case as follows (171 U. S. 568): 'The Act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing on interstate commerce, and possibly to restrain it.' Applying the rule of reason to the construction of the statute, it was held in the Standard Oil case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term restraint required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free

> movement of which it was the purpose of the statute to protect. The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideartion contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us."

In reference to the similarity of the rules, in reference to direct and indirect results, and legal and proper intents and purposes, as distinguished from those which are illegal and improper, and the rule in reference to reasonable and unreasonable restraints, in the Standard Oil case, it was said:

> "If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because as the construction which we have deduced from the history of the act and the anlysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be ap-

> plied. *From this it follows, since that rule and the result of the test as to direct or indirect, in their ultimate aspect, come to one and the same thing,* that the difference between the two is therefore only that which obtains between things which do not differ at all."

Applying therefore to the facts of the acquisition of the properties of the several mining companies in Butte by the Anaconda Copper Mining Company, the rules hereinbefore stated, it becomes immediately apparent that such acquisition did not amount to a violation of the Sherman Act. Neither did it, nor could it, result in an undue or unreasonable restraint of trade as that term is legally understood and interpreted.

The testimony of Mr. Kelley, hereinbefore set out at length, shows that the controlling purposes in these acquisitions were not to restrain or monopolize trade, but were to bring about large and essential economies in the production of copper; to save many of these companies from actually operating at a loss; to prevent the necessity of expending unlimited amounts of money in determining the apex rights of the various companies in order to protect the diversified stock interests held therein; and also to save enormous expenditures in maintaining and keeping up separate workings in the several companies; and carrying on separate and independent development work, all of which might well be done together; and the acquisition of the Alice property particularly, as well as many others, was for the

purpose of preventing the life of the company being extinguished and its usefulness ended by the depletion of its ore reserves.

The testimony of Mr. Gillie shows that with all the acquisitions of the Alice properties, the Clark properties and the Heinze properties, the ore reserves of the Anaconda Copper Mining Company combined, were not equal to what the ore reserves were of the several companies whose control was acquired by the Amalgamated Company in the year 1899.

These things were entirely legitimate; these purposes are free from fault. They demonstrate only the exercise of ordinary business prudence. Their essential tendency was, as we have hereinbefore pointed out, not to restrain, but to ultimately expand and develop interstate trade in the copper product. Such being so, whatever incidental restraint of either competition or commerce (the two being distinguishable), arose out of these acquisitions, must be held under the authority of all the cases to be indirect, collateral, incidental, and not inhibited by the Anti-trust Act. Also, whatever restraint, if any, incidentally arose, either to competition or to interstate trade, was not undue, neither was it unreasonable; but it was altogether reasonable under the definitions hereinbefore quoted. Can it be said to have been an unreasonable exercise of inherent right of every company or individual, to contract for its own advancement to acquire these properties, when the acquisition was absolutely essential for the purposes

hereinbefore stated? The acquisition was lawful; it was a reasonable exercise of the contracting power of the corporation in its direct purpose, and no unlawful intent was entertained. Its ultimate result will be, as the court knows, to enable the Butte camp to operate many years longer than it would be enabled to operate under the system of independent companies and organizations, all of which leads unerringly to a result beneficial to the interstate trade in the copper product. Such being true, the acquisition of these properties must be held to be altogether legal, and a legitimate exercise of the corporate power of the Anaconda Copper Mining Company to maintain and continue its own existence, and to carry out the purpose for which it was organized.

In Complainants' brief, the following is quoted from Judge Smith's opinion in the International Harvester Company case, 214 Federal, 987, the same being a case greatly relied upon by the Complainants in their argument:

> "Suppression of competition, where the parties to a combination control a large portion of the interstate or foreign commerce in the article, and where there is no obligation to form the combination, arising out of the fact that the parties to the same are losing money or the like, has been held an undue restraint of trade."

If the fact that the parties are "losing money or the like" would entitle those controlling a large portion of the interstate or foreign commerce in an article,

to enter into a combination in relation to the same, then would not the facts hereinbefore set out authorize the acquisition of competing properties in the same neighborhood, when the entire acquisition did not produce more than twenty-five per cent of the total output of the product in the United States? Certainly the impelling reasons for these acquisitions in the case at bar fall within the language of the decision "losing money or the like," and fully justify the acquisition of this property.

Again, in the Complainant's brief, the following, from the same case, is quoted with entire approval:

> "If the five companies which formed the International had been small, and their combination had been essential to enable them to compete with large corporations in the same line, then their uniting would, in the light of reason, not have been in the restraint of trade, but in the furtherance of it; but when they constituted the largest manufacturers of their articles in America, if not in the world, and held jointly about eighty to eighty-five per cent of the trade, and two, at least, of the companies forming the combination were prosperous, their combining was, when similarly viewed, an unreasonable restraint of trade."

By the adoption of this language as a correct statement, the complainants have overthrown their own contention.

It clearly appears from the evidence in this case, as hereinbefore pointed out, that the economies brought about by the acquisition of the properties acquired by the Anaconda Company were absolutely essential to

enable these companies to continue to be successful competitors, with a reasonable profit, against the other copper producers of the United States, and that these acquisitions were also absolutely essential in order that the life of the company might be prolonged, and it be enabled to continue to carry out its corporate purposes; and the reasons for these acquisitions pointed out in the testimony are certainly more cogent that the reasons assumed in this excerpt from the Harvester case as being sufficient to render combinations of independent manufacturers and dealers in agricultural implements entirely lawful.

The following excerpt from the same case appears to be greatly relied upon by complainants:

> "We think it may be laid down as a general rule that if companies could not make a legal contract as to prices, or as to collateral services, they could not legally unite, and as the companies named did in effect unite, the sole question is as to whether they could have agreed upon prices and what collateral services they could render when their companies were all prosperous and they jointly controlled eighty to eighty-five per cent of the business in that line in the United States."

It is unnecessary to inquire at length as to the technical accuracy of this statement. Taken in its entirety it is not pertinent to the case at bar.

We shall not attempt to determine when companies may unite on prices, but we assert that it has been determined under exactly what circumstances one company may acquire the property of another; or

two or more companies may unite in the operation of their business by the Standard Oil and Tobacco cases, hereinbefore referred to, and while this statement might have the effect to extend the application of the rules therein set out to the case of an agreement on prices, it cannot have the effect of limiting, modifying or changing the rules therein announced in reference to acquisition of property. We think, however, that the statement is unsound, and for the reason, among others, that it has been thoroughly demonstrated by the authorities that one company may acquire the property of another, or two or more companies may unite, when the main and direct purpose is to prevent the losing of money, to continue the life of the organization and its business, to put in force economies which enable it to compete with others more advantageously situated, although the indirect effect of such acquisition or combination may be to restrain commerce or raise the price of the article sold, whereas, any agreement to raise prices, between companies, must necessarily have for its purpose a direct effect upon trade and commerce, and might therefore bring about the evils condemned by the Act.

While we find nothing in the Harvester case which, in our judgment, controls the case at bar, we may be permitted to say that the quotations made from that case by the counsel do not appear to have been the opinion of the court. Three opinions were prepared and handed down. All the excerpts from the case are

from the opinion of Judge Smith, who wrote the leading opinion in the case. Judge Hook handed down an independent opinion in which he makes no reference whatever, either of approval or disapproval, to the reasoning of Judge Smith, except upon one point, and this one point is in fact the only point of concurrence among the three judges who decided the case, and that point is that the combination of dealers and manufacturers of agricultural implements, controlling from eighty to eighty-five per cent of the entire product of the United States, and located in different states, engaged in interstate commerce, necessarily, on account of its magnitude, resulted in a restraint of trade between the states.

Judge Sanborn, for whom both the lawyers and the judges of the country have long entertained a profound respect, dissented. But it clearly appears from that case that if this case were being considered upon the same principles as was the Harvester case, the result would not be ruled adversely to Appellees thereby, and this may be conclusively developed and demonstrated in a few words. In the Harvester case, the combined companies from the outset, controlled from eighty to eighty-five per cent of the entire production and trade in agricultural implements. It appears from the opinion of Judge Smith that that percentage was afterwards increased, to exactly what extent cannot be ascertained. The decree of the court in reference to the dissolution of this combination is as follows:

> "It will therefore be ordered that the entire combination and monopoly be dissolved, that the defendants have ninety days within which to report to the court a plan for the dissolution of the entire unlawful business into at least three substantially equal, separate, distinct and independent corporations, with wholly separate owners and stockholders."

The Court will observe that after the combination was divided into three distinct, separate, equal corporations, each of these corporations would be in absolute control, upon equal terms, with every other corporation, of practically thirty per cent of the entire agricultural implement product of the United States; so re-organized, the court deemed each organization lawful and not in contravention of the Anti-Trust law.

In the case of the Anaconda Copper Mining Company, with all of its acquisitions, it now, and at all times for many years past, has only controlled a fraction over twenty-one per cent of the entire copper production of the United States, and each year it controls proportionately less, and the court also knows, from the testimony, that this production is carried on under conditions greatly adverse to those enjoyed by the great bulk of the copper producers of the United States in its production. Furthermore, the copper production of the Anaconda Copper Mining Company, and all the copper production of the United States, has strong competition from the copper mines of Mexico and other countries of the world, whereas, the market in the United States for agricultural implements is

essentially confined to those produced therein. Thus, the final result of the International Harvester Company case is a direct authority which, if followed, would lead to a denial of the relief insisted on by the complainants.

But it is said that it it not essential that either the Amalgamated Copper Company or the Anaconda Copper Mining Company shall have brought about any of the evils against which the Anti-Trust law is directed, but that if either of them have the power on account of the magnitude of their holdings, to restrain trade or commerce, that they therefore become inimical to the law, and subject to dissolution, which dissolution is now sought in part at least by complainants in this case by taking away from the Anaconda Company the Alice properties. That which does not exist of course cannot be dissolved, and although the Anaconda Company might threaten a monopoly, this, of course, could be effectually restrained without its disintegration. But we assert that nothing appears in the evidence showing that either the Amalgamated or Anaconda Company has the power, on account of the magnitude of its holdings, to create a monopoly, either in whole or in part, of the trade in copper, or that either ever attained that preponderating influence in the copper business which is essential before it can be held to have violated or threatened violation of the law.

All authorities agree that any combination to be violative of the Sherman Anti-Trust law must have ob-

tained control of at least a preponderating part of the commerce in some particular article. The word "preponderating" may not mean the same in every case, but in the absence of some exceptional or extraordinary circumstances, such as the control of transportation facilities, or a monopolization of a raw product out of which the article is produced, or the like, none of which appears in the instant case, then preponderating influence can only be obtained by the engrossment of more than the major part of commerce, between the states, in some patricular article.

Neither Amalgamated nor Anaconda can legally be said to have had a preponderating influence in the copper commerce of the United States, when the total amount of their copper production is less than twenty-five per cent of the whole, and when they do not, by any trade contracts or control of transportation facilities, or otherwise, control the sale of copper in any geographical division of the country.

Neither can it be said that, controlling less than twenty-five per cent of the copper of the United States, which percentage is constantly decreasing, even though such control were created with an unlawful intent to monopolize interstate trade, the acquisition of the Alice properties, bearing zinc and silver only, would bring about a dangerous probability that either of said companies would ultimately engross a preponderating part of the commerce in copper, without one of the other of which there can be no violation of the Sherman Anti-Trust law.

In an article in the Columbia Law Review for December, 1910, Volume 10, page 687, Mr. Morawetz states that:

> "According to common usage in modern times, the phrase 'to monopolize commerce' means by the elimination of competition to secure to some individual or group of individuals control of all or of a largely preponderating part of the commerce in some article."

In the Standard Oil case, in referring to the section against monopolies, the Supreme Court thus interprets the same:

> "The commerce referred to by the words 'any part' construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance, that is it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce."

In other words, before there can be a monopoly, one of the classes of things, or one product which is in interstate commerce, must be monopolized in some geographical subdivision of the United States. Now, it is perfectly clear that the Anaconda Copper Mining Company has no power to monopolize copper, which is one of the classes of things mentioned, in any geographical subdivision of the United States. Its whole product is sold and must be sold, in every geographical subdivision of the United States, with the other copper producers of the United States, who produce over three-fourths of the product;

and also with the copper producers of Mexico and other producers of the world, and neither the Anaconda Copper Mining Company nor the Amalgamated Copper Company has the power, on account of the fact that they produce less than twenty-five per cent of the copper of the United States, to exclude from any geographical subdivision of the United States the competitors which now exist, and for years past have existed.

The decisions touching combination of competing lines of railway, of course, have no bearing upon this situation. Products shipped in interstate commerce over lines of railway, must be shipped over those adjacent. There is no escape from this. Therefore, a combination between the Great Northern Railway Company and the Northern Pacific would, at every common point touched or served by those lines, necessarily result in a monopoly in all shipments arising from those compelled to ship from such common points. Moreover, we assert that the authorities do not justify the conclusion that the mere possession of power to do an illegal act, or to form a monopoly, either in whole or in part, renders the corporation possessing such power, amenable to the Anti-trust law. It is true that there are some expressions in some of the cases from which such an implication might be drawn, but in every instance such expressions will be found to be either absolutely *obiter,* or to have been used in the sense that the power possessed by the combination necessarily resulted in a stifling of trade in interstate commerce; that the power, even if possessed, must be either exercised, or

that there must be a dangerous probability of its immediate exercise, before the law will be brought to bear upon such a combination or corporation, is so abundantly settled by the authorities that the question is not open to serious controversy.

In Moore on Interstate Commerce, Section 337, it is said:

> "The test of an unlawful combination under the Anti-Trust Act is its necessary effect upon free competition in commerce among the states or with foreign nations."

In Swift Company v. United States, 196 U. S., page 396, it was said:

> "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen."

Again, in the same case, page 402, it was said:

> "Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law." (Citing cases.)

On this point it was said in the Standard Oil case, on page 60:

> "The statute under this view evidenced the intent not to restrain the right to make and enforce

> contracts, whether resulting from combination or otherwise, *which did not unduly restrain interstate or foreign commerce,* but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint."

In the same case, referring to the decision in the case of United States v. Freight Association, and United States v. Joint Traffic Association, the court said:

> "As the cases cannot by any possible conception be treated as authoritative without the certitude that reason was resorted to for the purpose of deciding them, it follows as a matter of course that it must have been held by the light of reason, since the conclusion could not have been otherwise reached, that the assailed contracts or agreements were within the general enumeration of the statute, and that their operation and effect brought about the *restraint of trade* which the statute prohibited. This being inevitable, the deduction can in reason only be this: That in the cases relied upon it having been found that the acts complained of were within the statute and operated to produce the injuries which the statute forbade, that resort to reason was not permissible in order to allow that to be done which the statute prohibited. This being true, the rulings in the cases relied upon when rightly appreciated were therefore this and nothing more. That as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly *restraints of trade within the purview of the statute,* they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made."

In the Hopkins case, cited with approval in the Standard Oil Case, page 66, the Supreme Court said:

> *"There must be some direct and immediate effect upon interstate commerce in order to come within the Act."*

In the Addyston Pipe & Steel Company case, 175 U. S., page 244, it was said:

> "We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity."

In United States v. Union Pacific, 226 U. S., page 82, the Supreme Court quoted the following with approval from United States v. Joint Traffic Association:

> *"It is the* combination of these large and powerful corporations, *covering vast sections of territory and influencing trade throughout the whole extent thereof,* and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, *so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit."*

Again, in that case, on page 86, it is said:

> "If it is true, as contended by the Government, that a stock interest sufficient for the purpose was obtained in the Southern Pacific Company, with a view to securing the control of that company, and

> thus destroying or restricting competition with the Union Pacific in interstate trade, the transaction was in our opinion within the terms of the statute."

We have already pointed out the difference in the situation of two combining railroads, serving the same territory, and the combination which is now being discussed. Each independent road is a monopoly to a very large extent in and of itself, and the combination of two roads serving the same territory only enlarges that monopoly. A shipper residing at a common point touched by two railroads only, has no choice except to ship over one or the other. Therefore, if the two be combined, the monopoly of one is extended to the monopoly of the two, and geographically it becomes a complete monopoly, against which, or with which, no other railroad company can possibly compete. It must therefore necessarily restrict interstate commerce.

The distinction is apparent between this situation and the situation of the Anaconda Copper Mining Company selling its product in every geographical subdivision of the United States in direct competition with that of every other producer, both in the United States and elsewhere, and from which territory, or no part of which, any producer or seller could possibly be excluded.

In the Northern Securities Case, 193 U. S., page 331, the court said:

> "The Act declares illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be the parties to it, *which directly or necessarily operates in restraint of trade or commerce* among the several states."

Moreover, there is a distinct difference between public corporations, such as railroads, and private ones, such as mining companies, which is clearly pointed out in

> United States v. Freight Association, 166 U. S., 334.

The case of International Harvester Company v. Missouri, 234 U. S., cited by complainants, has no application. In that case the Supreme Court was construing a statute of the State of Missouri, the most casual reading of which will demonstrate to have been much broader in its terms and more drastic in its provisions than the Sherman Anti-Trust law. It has already been construed by the Supreme Court of the State of Missouri, and of course such construction was in the main controlling upon the Supreme Court of the United States. The statute of the State of Missouri was directed against, not only restraint of trade and commerce, "but also against all acts which would tend to lessen full and free competition." No such language as this is found in the federal statute, and it has been expressly ruled not to be so comprehensive.

> United States v. E. I. Du Pont, 188 Federal, page 127.

The O'Halloran case, 207 Federal, 188, is quoted from in complainants' brief as tending to show that power only is essential to render a corporation or combination unlawful. An examination of the case shows that the remarks in preference to power only were not at all essential to its decision, and the statement being *obiter,* the learned Judge did not use that precision or accuracy of expression which might reasonably have been expected, had the question been essential. Other portions of the paragraph quoted show beyond question that it was not used in the sense now attributed to it by counsel. Other declarations of the court show that the rule as contended for by us met its full concurrence. On page 189 it was said:

> "So far as the intent of the defendants is involved, they are presumed to have intended the necessary, natural and known effects or consequences of their agreements and acts, and if these *effects or consequences be to unduly restrain interstate trade and commerce, then the combination is illegal and the participants are chargeable with the consequences."*

Again, on page 191, the court said:

> "But when those theretofore engaged independently in producing and selling an article combine their money, intelligence and effort for the *purpose* of limiting the *supply and controlling the supply and controlling the prices of such article, and destroying competition, and they interfere with interstate commerce, or their combination is such as in its operation and execution will bring about these results,* they have become violators of the statute referred to, regardless of intent."

Certainly mere power would not subject the Anaconda Copper Mining Company to the forfeiture of its property at the suit of a stockholder of the seller; neither would it, upon the suit of the United States. Power, coupled with a wrongful attempt, realizing a dangerous probability, might subject the corporation, at the suit of the government, to the preventive remedy of injunction, but not to a dissolution or to disintegration. It is only when monopoly actually exists and no other remedy is apparent, that the unlawful combination will be dismembered. Upon this point in the Standard Oil Case, on page 77, it was said:

> "It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. Swift v. United States, 196, U. S. 375. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, *but also a monopolization,* the *duty to enforce the statute requires the application of broader and more controlling remedies.*"

Some pages of Appellants' brief are devoted to a discussion of the testimony of one Lawson, which it is claimed discloses that it was the intent of the original promoters of the Amalgamated Copper Company to form an unlawful combination to monopolize the copper industry of the world. In view of the admission contained in Appellants' brief, and the statement of the grounds upon which they rely, we are unable to understand why they should have called attention to this

testimony at all, unless it be that it is thought to be entertaining. In the brief of Appellants' it is said:

> "The intent with which the combination assailed in this case was formed is clear from its history without this direct evidence of the ends sought to be accomplished by its projectors, *but the intent in this case is of very little consequence,* the necessary effect of the combination being to place in the Amalgamated the power to restrain trade, the proof of intent to accomplish such restraint is unnecessary. It is only where it does not appear that the 'inherent nature and effect' of the combination is to restrain trade that the proof of intent becomes material." (See page 132.)

In view of this admission by Appellants it would seem unnecessary to take notice of the testimony of Lawson, as it is clearly herein stated that this testimony has no influence upon the determination of the question of the legality or illegality of the acquisition of the Alice properties by the Anaconda Company. Testimony to establish wrong-doing of this character must be clear, convincing and conclusive, and the testimony upon the point of this intention fails to satisfactorily establish it. A reading of the Lawson testimony impresses one with its improbability. Such a scheme as outlined by him would hardly have been entertained by men with business acumen like unto that possessed by Mr. Rogers and Mr. Burrage, his associate. In short, it appeared to be a project to corner all the money in the world and then with that money to buy the big round world itself. The manner of the examination of Mr. Lawson condemns his evidence. A voluntary and will-

ing witness for the complainants, he was persistently led in the examination by references and quotations from public statements made by him for hire through Everybody's Magazine, when he was engaged in the business of "muck raking" during "the muck raking" era, which happily now appears to have largely passed away. Having been placed in such a situation by the counsel of the parties for whom he appeared, it was the most natural thing in the world that even at the expense of his conscience, he would assert that that which he had so solemnly stated in the public prints was not open to question. Indeed, the situation in which he was trapped would, in the absence of time for deliberation, naturally lead to this result. Aside from the inherent improbability of his statements, he is substantially contradicted by Mr. Burrage's testimony, and by all the circumstances surrounding the organization of the Amalgamated. His statements are rendered further improbable by the utter impossibility of ever so powerful financial interests as those represented by Mr. Rogers carrying out the details of the disclosed plan, and fifteen years of unimpeachable conduct upon the part of the Amalgamated Copper Company and the Anaconda Copper Mining Company, furnish irrefragable proof that his statements in regard to the unlawful intent of the promoters of the Amalgamated are not substantially correct; but even admitting their truth, we are unable to conceive upon what legal principle such an unlawful intent can furnish ground for the rescission of the purchase of the Alice properties. There is positively

no evidence that such intent was ever put into effect by an attempt to monopolize, and even if it could be said that such an attempt was made, it must be said that it has proven to be entirely ineffectual; and an ineffectual attempt at combination, with an intent to monopolize, would fall far short upon well known legal principles of furnishing ground for the rescission of the purchase being considered. Neither Amalgamated nor Anaconda ever obtained a preponderating influence in the commerce in copper; neither ever had the power or reached so near attaining such power as to render it dangerously probable that interstate commerce in copper would be monopolized, and each year since the organization of the Amalgamated Company has brought both the Amalgamated and the Anaconda farther and farther away from such a preponderating control of the commerce in copper as would render either corporation objectionable. But there is a further consideration. It will be remembered that the Anaconda Company was a corporation long prior to the organization of the Amalgamated. It owned property, had property rights and thousands of stockholders. Since the organization of the Amalgamated it has acquired a majority of the stock of the Anaconda Company, and we are not advised upon what principle an unlawful intent, entertained by the promoters of the Amalgamated Company at the time of its organization, and by men, some of whom were never connected with it in any way or had any legal capacity to act for it after it became a corporation can, ten or twelve years thereafter be imputed to the Anaconda

Company, so as to take away from it property which it has purchased, and thus vicariously punish the thousands of innocent stockholders and other persons holding the securities of that company. It is neither law nor logic to punish vicariously or to visit the sins of the parents upon the children even unto the third and fourth generations.

United States v. E. I. Du Pont Company, 188 Federal, 127. This case, as presented by complainants, has, in our judgment, never been ruled upon the facts in any other case. To sustain the contention of Complainants would make the Sherman Anti-Trust Law so comprehensive in its operation as to render it ridiculous in the extreme. In all other cases which have been the subject of serious consideration by the courts, arising out of the Sherman Anti-Trust Law, there have been controlling facts which do not appear herein. In some there have been actual monopolization by unity of control of competing railroads. In some there has been actual monopolization arising as a necessary consequence of the combination having secured control of more than a majority of the trade in designated articles, and in almost every instance from seventy-five to one hundred per cent thereof. In some there have been actual contracts, dividing territory and restricting commerce. In others, together with these elements, or some of these elements, there have been violations of law, unjust treatment of competitors, espionage, and other evidence, showing conclusively an illegal purpose and

an unlawful intent. In no case has a combination been declared illegal and unlawful simply on account of the magnitude of its investments, without other facts giving to its transactions a criminal color.

In the Standard Oil Case, although the Standard Oil Company and its subsidiaries transported more than four-fifths of the petroleum derived from the Pennsylvania and Indiana oil fields, manufactured more than three-fourths of all the crude oil refined in the United States, owned and operated more than one-half of all the tank cars used to distribute its products, marketed more than four-fifths of all the illuminating oil sold in the United States, exported more than four-fifths of all the illuminating oil sent forth from the United States, sold more than four-fifths of all the naptha sold in the United States, and sold more than nine-tenths of all the lubricating oil sold to railroad companies in the United States, the Supreme Court did not base its decision adverse to that Company upon these facts, but upon its destruction of the potentiality of competition, and upon its methods of business adopted for the purpose of excluding others from the trade, and upon its acts and dealings done with the intent to drive others from the field and to exclude them from their right to trade.

Likewise, in the American Tobacco Company case. That Company produced from 70 to 96 per cent of the various kinds of tobacco products in the United States, but the decision was based upon the business methods used by it to drive competitors out of business.

Likewise, an examination of all other cases decided by the Supreme Court of the United States will disclose that no decision has ever been based alone upon the magnitude of the investments of the offending corporations, but other elements have been made the basis therefor; and never has it heretofore been asserted that control by one Company of less than one-fourth of an article of commerce in the United States would subject the offending corporation to any of the penalties of the Sherman Anti-Trust Law. We therefore say it is not ruled upon the facts by any precedent so much as it is ruled by reason, and when viewed in the light of reason, as it must be, the contentions of the complainants "vanish into thin air'.'

It will be hardly conceived upon what principle the purchase of a silver and zinc property by the Anaconda Company, a company controlling less than twenty-five per cent of the commerce in copper within the United States, would tend to defeat competition in the copper markets of the world, and therefore could be set aside and rescinded by a dissenting stockholder of the seller. The simple statement of the proposition bears upon its face its own refutation.

From the foregoing, we confidently assert that the decree of the court below should have gone unconditionally in favor of the Appellees; that there should have been no interlocutory decree; that the errors of the court touching its findings of fact, as well as its conclusions of law, detrimental to the rights of the Appellees in this

case, should be now corrected; and without further consideration as to the regularity of the proceedings had before the entry of the interlocutory decree, or their due authorization by the principles of equity, the final decree of the court below should be affirmed.

IV.

ALTHOUGH THE FINDINGS OF FACT MADE BY THE COURT BE NOT DISTURBED, AND BE HELD BY THIS COURT TO BE JUSTIFIED BY THE TESTIMONY IN THE CASE, THE DECREE OF THE COURT IS NEVERTHELESS CORRECT AND SHOULD, IN ALL RESPECTS BE AFFIRMED.

The decree of the court, directing the sale of the Alice property at public vendue, is vigorously assailed by complainants, but most of their argument touching upon the same is altogether beside the question and rests upon no sound basis either in law or reason.

The court framed its interlocutory decree largely upon the theory of the case of Pewabic Mining Company, 133 U. S., 50. In this connection the learned court below said:

> "The instant case in principal resembles Mason against Pewabic Mining Company, 133 U. S. 50. The difference between them is also of degree only. For a proposed sale of all property of a corporation in process of dissolution by the majority to a new corporation by them organized and for its stock to be distributed to the former's stockholders, is substantially like an executed-like sale for like consid-

eration and purposes by a majority of a corporation contemplating dissolution to another corporation in which they are interested, so far as the rights of minority stockholders are concerned.

"The rule of the Pewabic case is that any stockholder can insist that any sale of all corporate property upon dissolution shall be to the highest bidder for cash, and not to a corporation in which the majority are interested and for its stock at prices fixed by them.

"In the matter of relief to be granted, it appears plaintiffs own 12,560 shares of Alice of 400,000 shares outstanding. At the time of sale Butte-Coalition owned about 234,000 said shares. The sale was ratified by 289,590 shares, and opposed by 5,500. * * * In any event, at least 34,000 shares of Alice are owned by others than the parties hereto and Amalgamated. A court of equity will model relief so that all parties in interest, whether before the court or not, will be protected. As before stated, the majority could lawfully sell Alice. The minority's right was a fair sale for money to the end that each thereof received in money the value of his equity in Alice property. Their present right is to sufficient relief to still accomplish that end.

"The sale is not to be unconditionally set aside, however, for unless the property can be sold for more the interest of all the parties hereto and of those stockholders who neither appeared nor complained, require it shall not be disturbed. The method of the Pewabic case will be followed as near as may be. The value of the Anaconda stock paid for Alice was $1,500,000. Some $300,000 dividends thereon have since been paid. What was the amount of debts and obligations of Alice assumed by Anaconda does not appear. The decree will provide that a re-sale will be made and provided when made if no bid greater than the total proceeds to Alice as above be made, and provided thereupon defendants pay to plaintiffs and all those entitled thereto the

> money value of their equity in the proceeds of the sale heretofore made; that is, their proportionate share of the market value of the Anaconda stock at the time of the sale and of the dividends thereon, no re-sale will be made and the sale involved will be undisturbed. Thereby defendants will gain no advantage, plaintiffs will suffer no loss, and all Alice stockholders will receive their just dues."

(Tp., Vol. I, pages 187-188-189).

A moment's attention to the rights of all parties before the court in this case will demonstrate the correctness of the theory upon which the court proceeded, and the absolute soundness of the decree entered by it.

The Court found, as a matter of both law and fact, that Alice stockholders had a right to sell Alice property. It further found, and it is undisputed, that at a meeting of said stockholders, property noticed and held, it was voted to sell Alice property, and not only was it voted to sell Alice property, but a purchaser was found therefor and the terms of sale agreed upon. It is also found by the Court that the sale of the Alice property was authorized in pursuance of a plan touching the ultimate dissolution of the Alice Company. In this connection it should be borne in mind that not only had the Alice stockholders authorized the sale of Alice properties, but Alice stockholders had gone further, under authority granted them by the laws of the State of Utah, and at a meeting regularly called and held, the requisite number of the stockholders of the Alice Company had passed a resolution authorizing and requiring

the dissolution of the Alice corporation, the winding up of its affiars and the distribution of its assets.

No question is made as to the legal right of the stockholders of the Alice Company to do the latter, and no question is raised in reference to the regularity of the proceedings by which they sought to accomplish this result. Proper proceedings for dissolution, under the laws of the State of Utah, were, according to the allegation of complainants' bill, and according to the testimony in this case, pending at the time they were thwarted by the suit of complainants.

Dissolution of the Alice Company necessarily involved and carried with it the sale of all of Alice property and the distribution of the proceeds thereof to the stockholders. The right to so dissolve the Alice Company and the right to take all necessary steps under the law to effect such dissolution, including a sale of the Alice property, whether it be stock of the Anaconda Company or be the physical properties of the company, and to distribute the proceeds amongst the stockholders of that Company, has not been questioned, neither can the same be.

The only vice the Court found in the former sale to Anaconda was that there was doubt as to whether an adequate consideration had been obtained for the physical properties of the Alice, and that under the circumstances there should have been, if possible, a sale for cash. It was further held that upon final dissolution stockholders were entitled to receive their pro rata

share of the assets in cash instead of being compelled to take their share of the property of the Company in kind.

It is true that the complainants, representing an almost negligible percentage of the stock of the Alice Company, opposed, as stated by Appellants in their brief, the sale of this property upon any conditions whatsoever; but while they might have a right to oppose the sale of it in the manner and under the circumstances attending the first sale to the Anaconda Company, they never have at any time had any standing in court to prevent the Alice Company, through proper corporate and stockholders' action, dissolving said Company, which dissolution necessarily carried with it the sale of all its properties and the distribution of its assets, or to question the authority of the stockholders to provide, by resolution, for sale of the property, or to question the right of the majority to sell to Anaconda, provided there was no other purchaser who would pay a larger price.

The right of the majority of the stockholders of the Alice Company to sell the property of the Alice Company, and to dissolve the same, and the regularity of the proceedings which had been already taken to attain these ends, and the right to sell to Anaconda under proper circumstances, it was the duty of the court to maintain and respect in its decree, notwithstanding the objection of those dissenting, because this right was given to the majority stockholders by the laws of the State of

Utah, and before the institution of the suit effectual steps had been taken to attain these results.

The right to sell, also, as well as to dissolve, on account of the failing condition of the corporation, which was vindicated by the decision of the learned court below, was also an inviolable right which it was the duty of the court to protect in its decree.

Alice minority stockholders, objecting to the sale to the Anaconda Company, submitted their rights, as well as the rights of the majority stockohlders, to a determination of a court of equity, invoking its judgment therein, and the court would have been derelict in its duty if it had not so framed its decree that it would be effectual to protect the rights of both.

In 16 Cyc., page 478, it is said:

> "Equitable relief may be adapted to the circumstances of the case. There is no limit to the variety of decrees in this regard. While certain equitable remedies are called for with sufficient frequency to create definite rules for framing the decrees in such cases, in order to accord the appropriate relief, these categorical remedies do not limit the scope of decrees. While equity will not do that which is only a hardship to defendant and of no benefit to plaintiff, still where plaintiff clearly establishes his right, the court must award the appropriate relief without considering inconvenience to defendant. It is of course impossible to specify what relief may be awarded outside of the well-defined and common equitable remedies; but it may be said in general that the court will adjust the relief in such a way as to afford fair protection to the rights of all parties."

As already observed, when the Court came to enter its interlocutory decree it was its duty to protect not only the rights of the minority but also those of the majority. For the Court to have unconditionally set aside this sale would have denied to the majority of the stockholders of the Alice Company their undoubted right to dissolve the Alice Company and to dispose of its property and distribute its assets. It would have also denied to them their undoubted right, on account of the failing condition of the corporation, to sell and dispose of the entire property of the corporation as a step in the dissolution of the Company. It would have required the Alice Company to undo what it had already legally done in pursuance of these lawful purposes. It would have left undetermined and uninforced the rights of either. Before the majority could have made further progress in the accomplishment of these legitimate purposes, they would have to do over again the things already done, and once more submit to the court the question as to in what manner the indubitable right of the majority of the stockholders of the Alice Company to dissolve the Company and dispose of its property might be carried out. A result wholly inconsonant with the rules of equity or the jurisdiction of its courts.

The minority stockholders therefore had no right to prevent the dissolution of the Alice Company, nor to prevent a majority of its stockholders from selling its property and distributing its assets among its stockholders, nor to prevent their selling to Anaconda provided

a better price could not be obtained from others, but only had the right, according to the opinion of the court, to have the property offered for sale, sold free from any unfair bargaining on account of unity of control between the Alice and Anaconda Companies, and to have the assets of said Company converted into cash and their portion distributed to them in cash.

Complainants seriously object to the Court having directed the sale of this property at public vendue, but undoubtedly this was the only method known to a court of equity by which, when it becomes its duty to convert property into cash, this duty can be discharged. This clearly appears from the numerous citations of authorities found in the Pewabic case. And if the Court had not directed the sale at public vendue, what method could the Court have possibly pursued. The Court could not direct the complainants in this case to undertake a private sale of the property. This would have deprived the corporation and the majority stockholders of its and their rights in the premises; besides it would have availed nothing. Since the year 1910, up to the final decision of this suit, the minority stockholders of the Alice Company had full opportunity to produce a purchaser for this property who would give more than had been given for it by the Anaconda Company. This they failed to do.

The Court could not have directed the Alice Company, through its officers and a majority of its stockholders, to secure a purchaser for this property other

than the Anaconda Company. Courts do not commit the execution of their judgments and the carrying out of their decrees to the tender mercies of either of the parties to a litigation of this character; but they commit the sale of property, when such must be made under decree of the court, to an impartial officer appointed to carry out such purpose, and direct a public sale, upon due notice, as the method best calculated to obtain the best price.

Complainants make an ineffectual effort to distinguish the Pewabic case from the instant case, but unquestionably the principles of law controlling the two cases are identical. The Pewabic Mining Company was organized on the 4th day of April, 1853. By the laws of the State of Michigan the life of the corporation was thirty years, thereby its charter expired on the 4th day of April, 1883; but although its charter expired upon said date, it was provided by the laws of the State of Michigan "that all corporations whose charters shall expire by their limitation * * * shall nevertheless continue to be bodies corporate for the term of three years after the time they would have been so dissolved, for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their concerns, dispose of and convey their property, and divide their capital stock, but not for the purpose of continuing the business for which such corporations have been or may be established." The corporation continued its business until the 26th day of

March, 1884, but this is not material here. On the 26th day of March, 1884, within the period of time granted by the statutes of the State of Michigan within which said corporation could wind up its business, a resolution was passed by more than two-thirds of the stockholders of said Company, providing for the sale of its physical properties to another corporation for the sum of Fifty Thousand Dollars and the taking of stock in payment thereof, such stock to be distributed among the stockholders of the Pewabic Company; such of its stockholders as might refuse to take the stock of the new corporation, to receive their pro rata share of the consideration in money.

When it is remembered that in the case of the Alice Company a majority of the stockholders had sold its physical properties, under authority granted them by the common law, to the Anaconda Company for the stock of that corporation; and when it is remembered that exercising their indubitable right, under the laws of the State of Utah, proper proceedings had been taken by more than two-thirds of the stockholders of the Alice Company to dissolve the same, wind up the affairs and distribute its assets, the analogy between the two cases becomes instantly apparent, and that they are ruled by identical principles cannot be controverted. Both Pewabic and Alice were legally undergoing a process of dissolution.

The distinction attempted to be drawn by Counsel, that because in the Pewabic case a minority of the stock-

holders were insisting upon a sale at public vendue, and in this case a minority of the stockholders were insisting that no sale whatever shall be made of the Alice properties, is altogether unfounded, for the reason, among others, that the court below correctly found that the majority of the stockholders of the Alice Company had the right to sell, and had sold, the physical properties of that Company; and for the reason that it clearly appears, as hereinbefore stated, that more than two-thirds of the stockholders of the Alice Company had voted to dissolve that Company, such dissolution carrying with it the sale of the properties of the Company and the distribution of its assets, and their legal right to so dissolve the Company is admitted.

An unfounded contention therefore of the minority stockholders does not in the least alter the principles governing this case, as those principles are laid down in the Pewabic case; and while the minority stockholders in the Pewabic case were insisting on a sale at public vendue, the majority stockholders of the Pewabic Company were insisting that no such sale should be made; and it is inconceivable to us that any Court may be constrained to hold that minority stockholders of a corporation have greater rights than the majority thereof.

We are utterly unable to see the pertinency of the objections urged in Appellants' brief to the decree of the court ordering a sale of this property at public vendue. In the first place, if the court were to offer the property for sale, we might inquire of counsel in what

other manner should it have sold this property. Having the right to offer the property for sale, in order to protect the rights of all the stockholders, and particularly the rights of the majority to dissolve the Alice and to dispose of all its physical properties, the Court was bound to offer the property in a manner consonant with like proceedings in courts of equity. That there is no other known method by which the property could have been legally disposed of is, as heretofore stated, clearly apparent from the many authorities cited in the Pewabic case; and complainants having submitted their rights to the court cannot interpose any objection to the method of sale, so long as such method is consonant with the proceedings of courts of equity. And the fact, if such be a fact, that at such a sale the property might not bring as much as it might under some other method, furnishes no reason for complaint upon the part of the complainants.

It is further stated that complainants were unable to bid themselves for this property; that they had not the means to enter the competition. This statement, of course, finds no basis of fact in the record. Whatever evidence there is touching this point shows that the Walkers, and the interests controlled by them, were wealthy and powerful interests, amply able to bid upon this property if they had considered it a desirable purchase. In addition thereto, from 1910 until the date of the sale, the complainants had every opportunity to procure a purchaser for this property and have him

standing ready to buy the same when it should be offered for sale, if such a purchaser could be found. But all this is of no consequence. The stockholders of the Alice having the right to sell this property, and the right to dissolve the Alice Company, were not compelled by any known rule of either law or equity to refrain from doing so, neither was the court compelled to refrain from doing so, until the complainants should become financially able to purchase the same or sufficiently active and influential in the financial world to secure some one who would purchase it.

It is also said that no one could be found at this time who would bid more than a million and a half dollars for this property; that the Anaconda Company was in a more advantageous position to develop this property and make it profitable than any other company; that it could afford to pay more than any other person.

When seeking to set aside the sale to Anaconda, according to complainants, the consideration is totally inadequate; when seeking to prevent a sale at all, under the order of the court, the consideration is sufficiently large to prevent any competitors from bidding upon the property. These different viewpoints of counsel, taken to meet the exigencies of each situation, are certainly quite antagonistic to each other.

But upon what known rule of either law or equity can it be contended that the conceded right of the Alice Company and its stockholders to dissolve the corpora-

tion, to sell and dispose of its physical properties, and to sell to Anaconda under certain circumstances, and the duty of the court to protect these rights in its decree, shall be made subservient to the matters contained in these suggestions. Likewise, the Alice Company could not be compelled to hold its physical properties indefinitely because a timid investor might apprehend an appeal to the Supreme Court of the United States upon the suit then pending, or because the Anaconda Company desired control of this property and was big enough financially to secure the same, or because other purchasers might consider themselves unwelcome in the Butte Camp, or because of any of the reasons assigned in Appellants' brief.

The right to sell and to sell to Anaconda, and the right to dissolve the Company and the right to distribute its assets were rights granted by the State of Utah, and vindicated in the opinion of the learned district court below, and these rights could not be made to abide a change in conditions which assured to the minority stockholders that a greater sum than that paid by the Anaconda Copper Mining Company could be secured for the physical properties of the Alice Company. If such were the case, any minority stockholder of the Alice Company could forever prevent the Alice Company from being dissolved or from disposing of its property, for not even the complaining stockholders can look forward with any assurance to a definite time when they would be able to bid for this property or willing to do so, or successful

in obtaining a purchaser therefor willing to bid more than that which was bid by the Anaconda Company, or when the situation of the Anaconda Company in relation to the Alice property would not be relatively the same as it was at the date of the purchase, or when the Anaconda Company would not have a perfect right to raise the bid of any bidder therefor, or when some dissenting stockholder might not institute litigation touching the sale of the property which might terminate in an appeal to the Supreme Court, or when it might not be unjustly charged, without any basis in the testimony, that any new-comer in the Butte Camp would be regarded as an interloper.

We respectfully submit that the decree was in all respects correct; that it protected every right which the law gave to the complainants. It gave them every opportunity to either purchase or secure a purchaser, at an advanced price, for the Alice properties. It provides a means by which they were entitled to have the assets of the Alice Company distributed to them in cash instead of in stock of another Company; and it also protected the rights of the majority of the Alice stockholders to sell all the property of the Alice Company, and to dissolve the corporation and to wind up its affairs. All the minority stockholders could possibly ask for was a full and fair opportunity to find a purchaser for Alice properties who would pay more than Anaconda. This full and fair opportunity was given to them. They absolutely failed. No purchaser could be found. For the

Court, under these circumstances, to have unconditionally set aside the sale of the property to Anaconda, and to have forbidden the majority of the Alice stockholders to sell the property to Anaconda, would have been to indefinitely suspend the authority which the majority of Alice had to dispose of the property, and would have been a gross wrong to the Alice Company and the majority stockholders thereof, and would have been saying in effect that the rights of the Alice Company and the majority of its stockholders should be held forever subservient to the claimed rights of the minority to control and regulate its affairs.

The decree is expressly authorized, not only by the general principles of equity, but by the decision in the Pewabic case, and ought, in all respects, to be affirmed.

Respectfully submitted,

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